UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re FLINT WATER CASES Case No. 16-10444

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MOTION HEARING

BEFORE THE HONORABLE JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE

JUNE 2, 2021

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I N D E X

MISCELLANY

P R O C E E D I N G S

THE CLERK: The Court now calls the Flint Water Cases.

THE COURT: Thank you, Julie. Well, welcome back first to my court reporter, Jeseca Eddington. I'm thrilled that you're back from leave. So it's great to have you with us. And welcome to everyone else who's either arguing the motion today or observing our hearing.

This is the date and time for oral argument on the plaintiffs' motion for class certification in the putative class case against Veolia, which is also referred to as VNA, and LAN. They are two of the water engineering firms that entered into municipal water consulting contracts with the City of Flint.

Those contracts, of course, were related to the switch from the Detroit Water and Sewerage Department to the Flint River as a water source for the City of Flint back on April 25th of 2014.

LAN advised the city at two different times. Once before the switch and once after. And VNA's contract was entered into after the switch to advise the city about the water.

So let me start by making clear that this hearing is separate from the motion that has recently been filed on Friday for a final approval of the partial settlement. And

that particular vehicle, the partial settlement, does not include a class mechanism for minors. But it does have a class mechanism for other claimants.

With respect to minors, the partial settlement has a claims process that addresses the safeguards that Michigan law provides to children who have been harmed by the conduct of another person or entity.

So I want to make sure I understand who's arguing. I think Mr. Morrissey is arguing for plaintiffs.

Is that correct, Mr. Morrissey?

MR. MORRISSEY: Your Honor, we've divided it up amongst ourselves for particular components of it. Ms. Levens will be handling the first topic on the Court's agenda. I'll be handling the (b)(3) with the overall standard and property damage. Ms. Peaslee would address any questions the Court has on the business subclass. And --

MR. LEOPOLD: Jessica Weiner --

MR. MORRISSEY: And Ms. Weiner will address any issues on the adequacy of [Inaudible].

THE COURT: Okay. Thank you.

And for VNA, is that you, Mr. Campbell, who will be arguing?

MR. CAMPBELL: No, Your Honor. Good afternoon. We have Mr. Timothy Bishop who's with us who entered an appearance last week. He will be taking the lead in doing

most of the argument. With him is Mr. Minh Nguyen-Dang, who will be addressing the minor subclass issue. And Mark Ter Molen may also speak regarding if there are technical issues. And Alaina Devine and I are here if we need anything else, which I doubt we will.

THE COURT: Okay. Good. Thank you. And then for LAN.

MR. MASON: Yes, Your Honor. Wayne Mason. I'll try to make it simpler for you. My partner, Vance Wittie, will be addressing the Court on all of the issues. I'll be available obviously to weigh in if the Court has questions or something comes up. But Vance Wittie will be addressing the Court on behalf of the LAN defendants.

THE COURT: Okay. Well, thank you. So we have some new voices today, which is great. I would know who you are if the screens were all turned off and I heard most of your voices. And that's not a bad thing, but it's just true. So thank you for letting me know who will be arguing.

I've had the benefit of reading the initial motion, which was filed now almost a year ago, the responses by the various defendants, and an omnibus reply. For those of you who've not had this opportunity, there are about 600 pages of briefing awaiting you. I extended the 25-page limit for these briefs and responses. I also received responsive briefing from Mr. Stern and Mr. Shkolnik and in opposition to the

motion for class certification.

So what I'll do -- and I will certainly allow them a moment at the end if they believe that it is warranted to say something on behalf of their clients if they wish to. But I think the main arguments are here by the folks who are both plaintiffs and defendants in this case.

So I sent out late yesterday -- and I'm sorry it went out so late -- an order in which I think it makes sense to me to take this in. And so I wanted to begin with certainly an opening by plaintiffs. This is your brief. So please feel free to make any general opening remarks. And.

Then I'd like to move to a discussion of the master class definition and we'll go from there. But as we get to each topic, I'll turn to the defendants for a response and then provide time for a rebuttal.

So why don't we begin with whoever will be making some opening remarks for the plaintiffs.

MS. LEVENS: Thank you, your Honor. I can do that for the class. Unless, Ted, would you like to say anything again?

MR. LEOPOLD: No. I was just going to introduce you, Emmy. But Judge Levy is both aware of you and your talents. That's why you're leading off this horse.

THE COURT: Okay. Go ahead.

MS. LEVENS: Thank you, your Honor.

As described in our opening motion, class certification is the most efficient and effective approach to obtaining justice for the tens of thousands of Flint residents and businesses harmed by the tragic and unnecessary contamination of Flint's water supply but who have not chosen to file their own suit.

More than five years have passed since the first lawsuits in this case were filed. And both Your Honor and Judge Farah have recognized that it could be years before Flint residents' individual cases could be brought to trial. Class certification would allow the resolution of key threshold liability questions for the broader class as well as the resolution of additional issues related to the fact of injury and damages with regard to the proposed subclasses.

As explained in Amchem, a case like this involving a mass tort and repeated oftentimes by this circuit, the goal of Rule 23 is to achieve the economies of time, effort, and expense and promote the uniformity of decisions.

These are the precise goals that would be obtained by certifying the class here. In it's essence, Rule 23 is an inquiry that seeks to access the extent to which class members' claims can be proved with evidence that is common to the class. All that means is it's the exact same evidence for everybody.

In granting preliminary approval of the proposed

settlement, this Court recognized that the basic -- the basic practical predicate that gave rise to this Flint water crisis at least with regard to the government defendants, it is the same for each and every class member.

In addition to the claims that plaintiffs brought against the government defendants, plaintiffs have also alleged that LAN and Veolia engaged in a common course of conduct that caused or prolonged the contamination of Flint's water supply. It is this common course of conduct that constituted professional negligence and entitles the proposed class to damages.

Plaintiffs have shown that several critical components of this professional negligence claim can be proven using evidence that is exactly the same for each and every class member.

For example, plaintiffs can demonstrate the existence and scope of LAN and Veolia's duty using common evidence. That evidence is their contracts with the city as well as testimony from our expert, Mr. Russell, who opined on what the duty of care is for professional engineering -- for a profession engineer. As well as our expert, Dr. Gardoni, who has opined that the engineering codes of conduct promulgated by various government and non government agencies inform the standard of care.

Veolia and LAN in their briefing and oftentimes

before this Court they have disputed many of our asserted facts. For example, at a recent hearing, LAN's counsel repeated several times that in their opinion the codes of professional conducts are simply aspirational and should not be used to inform the duty of care.

That LAN and Veolia have argued a different version of these facts, however, simply reaffirms the importance of certification here. Because regardless of whether the court and jury agrees with Veolia and LAN or plaintiffs, that decision as to duty will be the same for all class members.

This alone would be sufficient to satisfy Rule 23(a)'s commonality requirement. But additional elements of our claim can also be established using common evidence. For example, the issue of breach, which for the non lawyers out there, is how plaintiffs demonstrate that LAN and Veolia have engaged in professional negligence here. All of the evidence is common to the class.

Your Honor, did you have a question?

THE COURT: Well, I guess I have a -- I do have a question. I think there's one issue that I think you're addressing, which is common issues that go to duty and breach. But in your opening remarks, you seem to imply that there would be common evidence of causation. And I want to distinguish two types of causation that we'll be talking about today.

The first is whether the conduct of LAN and Veolia is alleged to have caused toxic water or continued the Flint water crisis. And the second is whether that caused damages in individuals.

So I think there are two ways in which we're going to use that word causation. And I can see that there would be a common issue, common evidence on potentially on duty, whether that duty was broken or breached, and whether that breach caused or prolonged the Flint water crisis.

What I don't see is how there would be common evidence. I think the defendants have argued very strenuously and in a way that I have not seen overcome in your briefing that there would not be common evidence of causation for each individual. And they tell me in the briefing, and I'd like to hear your response to this, that different individual homes had different levels of lead potentially. And some may have had hopefully none at all, but many had some degree of lead. And that would need to be looked at individually.

But then within the home, people stopped drinking the water at a certain point. Or some weren't drinking the water. They were out of town. They were otherwise using bottled water or that sort of thing at a certain point. And there are a variety of other harms that people allege fecal coliform infections, Legionella infections. But that certainly didn't impact everybody.

So tell me how there would be common evidence on the issues of causation of damages. Not causation of the water crisis.

MS. LEVENS: Yes, Your Honor. And also as a preface I'll say please jump in and interrupt me if you have a question. One semi-awkward aspect of this very tiny Zoom box situation is that it's a little harder to tell.

As a baseline, class plaintiffs believe that the critical issues of duty, breach, and causation as to the water contamination are sufficiently meaningful. That at the very least the Court could certify those under 23(c)(4) and bifurcate liability from issues of cause -- from certain issues of causation and damages. And that that would materially advance the litigation.

Additionally, with regard to the second aspect of your question, and the case law is a little strange but Sterling and many other cases just like Your Honor recognize that causation can often be separated into two components. The general causation of the contamination event or the propensity for contaminants to harm people as well as the specific causation of harming individual class members.

THE COURT: Right. And that's what I'm interested in. How could that be a common question?

MS. LEVENS: I will also let Mr. Morrissey speak on this issue because it transcends some of the (b)(3)

predominance issues. But class plaintiffs have proffered expert testimony that shows using well accepted methodologies that the contaminated water resulted in lead for all class members and damaged all homes. But I'll let Mr. Morrissey add to that with regard to the specifics.

MR. MORRISSEY: Yes, yes.

THE COURT: Okay. Let's just put the hold on that, Mr. Morrissey. Because I want to still go back to the class definition for a moment, which is where we were starting.

Tell me how the class definition is not overbroad with respect to VNA. Their contract did not begin I think they said until February 10th of 2015. Your class definition starts with the switch to the Flint water crisis in April of 2014.

How could that be proper with respect to VNA?

MS. LEVENS: The class definition is proper with respect to VNA because the timing with which they caused damages to Flint only impacts the amount and allocation of damages and responsibility.

So for example, plaintiffs have alleged that Veolia engaged in a common course of conduct. It is a fact question as to what the exact date is upon which Veolia should be deemed responsible for injuries caused by that conduct. It would be up to a jury --

THE COURT: I'm sorry, Ms. Levens. But what would be

the harm in having two different class definitions with respect to two different defendants? Which would eliminate any confusion about the degree of responsibility for each of the two defendants.

MS. LEVENS: That would also be entirely acceptable and is an easy fix under Rule 23.

An additional thing the Court could do is provide guidance to the jury with respect to things like Veolia cannot be held accountable for harms prior to a date and asking the jury to allocate fault among whichever actors it believes to be at fault before a certain date and to then engage in that same process again after the date.

So I think the general process is the same. And there are a lot of tools that the Court can use to make sure that there isn't any confusion.

THE COURT: Okay. And you've suggested that I should create the new class definitions. And I guess I would send that back to you as the plaintiff is the master of their own complaint. And asking the Court to define or write a class definition, I'm not sure that's helpful to me. So if I determine that I need a new class definition, I think what I'll do is request additional briefing on what that would be.

MS. LEVENS: Yes, Your Honor.

THE COURT: Let me ask you this about the class. Your master class is defined as all current and former

residents of the City of Flint who for any period of time between April 25th of 2014 received drinking water supplied by the City of Flint regardless of whether they paid for it.

What do you mean by received? How do I know who's in this and who's not? If I drive through Flint, stop at a restaurant, and drank coffee, did I receive water?

MS. LEVENS: Yes, you would qualify as having received water if you just had coffee. You would not qualify to be a member of any of the proposed damages subclasses. The word received is used in lieu of, for example, ingestion as a minor subclass because it's meant to include both those individuals who drank the water as well as the fact that this water caused property damages to homes when it entered the home.

THE COURT: Okay. So in the master class is a 23(c)(4) issues class only?

MS. LEVENS: Correct, Your Honor.

THE COURT: Okay. If I -- after all is said and done with the argument and my reading of the cases and so on, if I determine that an issues class only is appropriate here, do the minors -- do the subclasses for minors, property, and business go away?

MS. LEVENS: They do not automatically go away. There are several different approaches that the Court could take. It could hold the request to certify those subclasses

in abeyance because technically the Court need not consider that until after a liability determination. To the extent the Court did not wish a liability determination with regard to the broader class to bind any of the subclasses, they could also be defined out of that broader subclass.

Or finally as a third option, the Court could both certified the (c)(4) class as well as the damages classes.

Several of the circuit court opinions -- Whirlpool, Olden, Sterling -- all of those contemplated the court considering what would be the best procedure for addressing individual causation and damages for a time after the trial on liability. So Your Honor would be well within her discretion to take that same approach here.

THE COURT: Okay. Something else that I'm interested in. Your brief talked about averting behaviors that people took such as buying bottled water. Are you seeking damages for people who did not -- let's say with respect to VNA, that by December of 2014, let's say, or January, early January 2015 began drinking bottled water exclusively, are you seeking damages for those people as to VNA?

MS. LEVENS: With regard to individuals, no. We have described that those are damages that might be quantifiable on a larger basis. But they are not included in either any of the 3 subclasses for which we are also seeking certification of a damages class.

THE COURT: Okay. Now -- okay. So defendants have argued that the subclasses are broader than the master class in terms of their definition. So what -- because you've got current and former residents in the master class. But in the subclasses, you could have people who have not lived in Flint who may have attended a daycare, something like that.

So is that permissible to have subclasses that are more inclusive than the master class?

MS. LEVENS: Yes. For clarity, to the extent the Court only certified (c)(4) and held off on the question of whether to certify the subclasses, we would ask for leave to amend the larger class definition to be inclusive of all the individuals within the subclasses just so that any liability determination would be binding on all members.

But plaintiffs have actually done exactly what courts and the rule want, which is make efforts to narrowly tailor the subclasses to only those types of claims that we think the fact of injury or in the case of property and business the amount of injury could be determined on a class or subclass-wide basis.

THE COURT: Okay. So the master class, is that -- I'm a little bit confused because the master class you've told me is a 23(c)(4) issues class.

Are you seeking any damages for adults who ingested the water?

MS. LEVENS: No, Your Honor. In the event of a successful liability determination, adults would be able to pursue their own damages. But at this time -- and we could discuss procedures for efficiently addressing any of those claims. But at this time we're not seeking damages for those on a class-wide basis.

THE COURT: Okay. Then let's look at the definition for residential property subclass. I can't tell you how many times I've read this. And so I need you to answer this question. It says all persons and entities who from April 25, 2014 to present owned residential property.

Do they have to have owned it on April 25th or could I have purchased something in 2016 in Flint and qualified?

MS. LEVENS: I'll defer that to Mr. Morrissey.

THE COURT: Mr. Morrissey.

MR. MORRISSEY: You have to have owned it during the crisis. You could have bought it at some point after the switch and before the switch back to Detroit water but not subsequently.

THE COURT: So doesn't that have to be amended then? Because it says all person and entities who from April 25, 2014, to present.

How would I know if I'm in it or not if I bought something in 2016? And how would I know that if I bought something in 2018 I'm not in it? Because it just said I had

to own it at any time from the 25th of April 2014 until now.

MR. MORRISSEY: That point is well taken, Your Honor, and it's something that should be clarified in the notice should that subclass be certified.

THE COURT: Okay. Because the business subclass I think is clearer because it just says all persons and entities who as of April 25th owned and operated a business. So there you're telling me if I purchased a business before the crisis was known, let's say in March 2014, I'm out.

I can't collect damages, right? Is that what you meant?

MR. MORRISSEY: If you purchased beforehand --

THE COURT: Let's say I purchased my business, it's a small restaurant --

MR. MORRISSEY: Right.

THE COURT: A month after the crisis began in April 25, 2014, your expert tells me my business would have lost revenue. But anyway, I'm not -- I can't be in your class the way it's defined because I had to own the business as of the day of the water switch, not a day after.

MR. MORRISSEY: That point to you should be clarified, Your Honor, in the notice that it would be anyone who obtained a business -- owned it beforehand or acquired it in that stub period between the beginning of the crisis -- the switch and the end of the crisis, which I believe is a very

small number of any businesses. Ms. Peaslee is speaking directly to the business issues.

THE COURT: Okay. Mr. Morrissey, can you speak up just a little bit when you speak?

MR. MORRISSEY: Yes.

THE COURT: Okay. Thank you.

MR. MORRISSEY: Thank you, your Honor.

THE COURT: Okay. Well, why don't -- is there anything further, Ms. Levens, on the definition of the classes that you're seeking that you'd like to address?

MS. LEVENS: Not at this time unless Your Honor has questions. We're happy to move on or defer to defendants.

THE COURT: Yeah. I do have questions when we get to what the appropriate issues would be that you're seeking to have certified. But in terms of the questions I had about your general definition, I think I'm in good shape.

So why don't we move to -- will VNA respond next?

MR. BISHOP: Yes, I'm ready to do that, Your Honor.

THE COURT: Okay. Thank you.

MR. BISHOP: You know, as you've observed and I think as we just heard Mr. Morrissey concede, these class definitions are a mess. And of course these are the class definitions that we briefed and that plaintiffs' experts have addressed. So there's a problem. There's a problem here. And it's not either your obligation, as you have noted, or

ours to rewrite their class definitions for them.

We don't think that any class should be certified here. So you know, it's certainly not our job to fill it with what we see as deck chairs on the Titanic by addressing these definitions. But on their face, the proposed subclasses are not subclasses. They're not subclasses at all. They're separate classes.

By definition, a subclass has to be a subpart of a larger class. And I have not heard plaintiffs' point us to any case, despite Ms. Levens' protestation that certifies as a subclass something that is not a subpart of the class.

And the examples here, you've already pointed a lot of them out, but the master class covers residents up to October 16, 2015. The minors class covers residents and fetuses through January the 5th, 2016. So a fetus in utero in Flint on January the 4th, 2016 is a member of the minor class but not the master class. It's not a subclass.

A non -- I'm not exactly sure where we are after what I've heard on what the nonresident, the property ownership class is. But as I read the language in the subclass definition, a nonresident property owner who bought her property in 2020 is a member of the property class but not of the master class.

A nonresident who owned a Flint business on April the 25th, 2014, and sells it the next day is a member of the

business subclass but not the master class. None of that makes any sense. I can go on with a lot of similar examples. And Your Honor's clearly gotten this point from the questions that you've asked.

But another inconsistency worth mentioning is that the minors class begins on May 1st. Because Dr. Weisel testified that's when the effects from the switch to Flint River water would kick in. Not earlier. Yet the other classes begin on April 25th. When according to plaintiffs on expert, the effects of the switch would not yet be manifested.

THE COURT: Let me ask you, Mr. Bishop, just going back to what you said. If plaintiffs fix this by adding to the master class definition including all individuals and entities in the subclasses, does that solve the problem?

MR. BISHOP: No. That's a morass, Your Honor. That's a unmanageable morass to put different time limits and different -- entirely different categories of plaintiffs and damages into the same master class. I just don't know what that does to notice.

What's really going on here is you have eight different classes. You have four classes for VNA, four classes for LAN. The master class is really a separate adult class. You have eight classes which would require eight notices.

I don't think a notice could be given that could

encompass a class that meshes together all of these categories of claimants and claims.

THE COURT: I don't see the notice issue as the hurdle. I hear what you're saying, that I think the class definition needs work, but not just because it would be difficult to community in a written notice.

MR. BISHOP: Well it would be difficult to -- I mean, it's going to create trouble difficulties, too. I mean, I don't want to downplay the difficulty of the notice. I mean, Shutts requires that the notice be truly informative of each potential class member of what is going on and what their options are. And I think that would be difficult to do with this morass of claims put in together.

I think this is really, as I say, eight different classes requires eight sets of notice. That's our position.

THE COURT: Okay. Thank you. Let me go back, Ms. Levens. Do you have cases where courts have certified or a Court of Appeals has confirmed the certification of subclasses where the members of the subclass are not members of the master class, which would be the case here?

MS. LEVENS: I honestly don't know the answer to that, Your Honor. I will say though that this is largely a distinction without a difference. Because to certify a subclass, each and every one of the elements for a larger class must be satisfied.

So we're not trying to ask for any lesser burden with regard to the subclasses. If anything -- and admittedly there are some things that could be ironed out. But if anything I think the additional information was intended to add clarity, not take away from it.

I think a lot of the cases that are in similar situations have actually done the exact opposite approach of what plaintiffs took here and just gone with an incredibly broad class definition and then taken as an assumption that questions about things like dates and whatnot could be ironed out in subsequent phases.

For example, even with a case like Whirlpool, you know, that opinion talked about issues such as how they used their washing machine and when and if Whirlpool provided warranties with regard to the machine. All of those are the kind of things that might warrant breaking things out by dates or adding additional clarification, but the court basically decided to deal with those at a later stage.

So we are happy to make a motion to clarify this. But I don't think that this is a distinction that should be used to deny class relief here.

THE COURT: Okay. Let me also ask you a question following up on your opening remarks. You suggested, and it's just sort of sinking in to me, that if I can only certify the issues class for your master class that I should defer a

decision on subclasses as opposed to denying that.

Is that what you said? On damages subclasses.

MS. LEVENS: I don't believe I said should. I think I said could.

THE COURT: Okay.

MS. LEVENS: Our position is that you should certify them right now. I think, however, that Rule 23(d)'s statement that Court can amend and alter class definition at any time combined with the fact that several cases within this circuit entirely deferred defining what the procedures would be for addressing causation and damages make it so that the Court could do that if it wanted.

THE COURT: But why would a liability determination make it any easier? Why would that make causation proofs common? Causation as to individual damages. Let's say I certify six or seven of your issues, how does that make anything more clear about causation of damages?

MS. LEVENS: It doesn't. And that is also why we simultaneously moved for certification of the subclasses because we believe that our expert evidence establishes that now. I will say though making that statement was more of an efficiency concern. To the extent a liability class were certified and the class lost on liability, there really is no need to get into these intricate questions of how we go about mobilizing an affirmative liability verdict. And so it's one

option at the Court's disposal.

THE COURT: Okay. Anything else, Mr. Bishop, right now? Or should I move to --

MR. BISHOP: Yes, I'd like to address that, Your Honor. You can't just put off these questions about whether the majority of the subclasses here, which are not really subclasses, can be certified.

They're asking you to issue certify elements of the main class for the purpose of moving along this litigation. We don't think it will move along this litigation. But it becomes even clearer that it won't move it along if we don't know if there are going to be any of these subclasses certified down the line.

I think the plaintiffs have an obligation to supply us with some definitions now that they think that they actually want to certify and then we ought to look at those and discuss those. And we obviously don't believe that anything should be certified. But we are not making any efficiency gains or moving along this case towards resolution by certifying any issues when we don't know what cases those will impact, whether there are going to be any classes down the line that those would actually play a role in if they were determined. Thank you.

THE COURT: Okay. And Mr. Bishop, if I require plaintiffs to submit or I create two master classes, one that

starts with VNA's entrance into Flint and one that starts with LAN's contribution to what happened in Flint, would that satisfy your protestations about the overbreadth of the master class?

MR. BISHOP: It would -- a class that started when we submitted our initial report on the February 18th would deal with that overbreadth problem.

THE COURT: Okay.

MR. BISHOP: Obviously it wouldn't deal with any of the other issues that we've raised with regard to the subclasses. But we do think that at a bare minimum, there should be a separate class for VNA that should start on February the 18th.

THE COURT: Okay. Ms. Levens, would the 18th be the right date from the plaintiffs' perspective?

MS. LEVENS: Plaintiffs would be fine with that date. Yes, Your Honor.

MR. MORRISSEY: Your Honor, I believe the date should be the date of the contract.

MS. LEVENS: I assumed that was the date of the contract.

THE COURT: No, that's the date of the report.

MS. LEVENS: Oh. Excuse me. It should be the day of the contract.

THE COURT: Why the date of the contract? The date

the contract is entered into, VNA hasn't done or failed to do anything that date. Why isn't it when later when they issued their report?

MR. MORRISSEY: The date the contract was signed and even beforehand, Veolia was on the scene in Flint and beginning to do work. Entering the weeks between when they were retained and when the report was issued, the Veolia engineers had opportunities to speak up and did not.

The handwritten notes from Mr. Gnagy, the lead engineer for Veolia, in which he did not calculate the CSMR that was available from the data right in front of him were written in that intervening period for instance.

THE COURT: Okay. All right. Well, that's good to know. Mr. Wittie.

MR. WITTIE: Thank you, your Honor. I think the sum of what has been said here points out the critical importance of getting these class definitions correct.

For example, it's clear that the subclass must be a component of the principal class and be contained in it. Because otherwise if you had, say, an issues trial has been suggested and say there was a determination of non liability, who would it be conclusive as to?

If there were members of the subclass who were not members of the main class, then obviously there would be no attempt then to certify the subclasses after the failure of

the main class issue trial. And you would have a one-way opt in at that point and people would simply deny that they were members of the principal class.

So it's very vital that we have rigorous class definitions which will tell us exactly whose claims are being, you know, adjudicated at a particular time.

I know they're a gaping problem about the scope of the definitions is the fact that nonnatural entities presumably would not be defined as residents of the City of Flint and therefore would not be included within the master class but would be included potentially on the resident owner, resident property owner's subclass and of course the business subclass. And that's going to be a significant problem with the way that those classes are currently formulated.

THE COURT: Okay. What can you tell me about that, Ms. Levens? Should it say residents or entities? No.

MS. LEVENS: I actually think the solution to that that we proposed was just to amend the broader class definition to say and members of the proposed subclasses. There was no intent to create a one way intervention problem. And in fact the goal is quite the opposite to adjudicate liability for all entities that have not chosen to bring their own case and then to address how to identify damages for those entities.

THE COURT: Okay. All right. Anything further on

this question, Mr. Wittie?

MR. WITTIE: Not on the definitional or question. And I thought it best to reserve other arguments for other times.

THE COURT: Good. Thank you. Okay. Well then why don't we start with my concerns about a minor's class. And as you're all aware, the Court ordered supplemental briefing after reading the opening motion for class certification.

I saw in that motion that you were seeking to certify an opt-out class of minors. And I had already done research on that issue at least a year earlier trying to understand what we were doing and what direction we were heading in.

And through that process, I was alerted to the remarkable safeguards that exist in the State of Michigan for minors who might have suffered tort injuries, personal injuries and seek damages through litigation. And I thought that the opening brief only sort of covered it in a page or two and I wanted to hear more about that.

So that issue has now been fully briefed by both sides.

And who was going to cover that for plaintiffs?

MS. LEVENS: I can address questions with regard to that, Your Honor.

THE COURT: Okay. So here's the situation. So we have the Rules Enabling Act and Michigan law.

How does the combination of the Rules Enabling Act and Michigan case law not prohibit me from certifying a (b)(3) minors damages class?

We know that the Woodman case -- and here Judge Farah, I'm so glad you're here because I'm calling upon Michigan law. The Woodman case tells us that lawsuit seeking personal injury is a property right of a child. It's a substantive right of a child. And it is therefore subjected to a whole range of safeguards.

Even a parent can't just file a lawsuit on behalf of a child without having the blessing of the Court as the next friend. And children have until one year after the age of majority, until their 19th birthday, to determine whether they want to sue for damages that happened up through their 18th birthday.

The partial settlement, the master settlement agreement does not create a class. And what I saw, Ms. Levens, in your reply brief was reference to the procedure set forth in the MSA in the partial settlement. But what you didn't address in the reply brief is that that partial settlement doesn't bind a minor to anything at this point.

They have until one year after the age of majority to file a claim and we have what's called a future minors fund. No one is required to sue or to make a decision about a suit until that point in their life.

So it's not helpful to me to say, well, you're working it out in the partial settlement. So tell me how this does not violate the federal Rules Enabling Act and Michigan law.

MS. LEVENS: A couple of things there. First of all, to the extent that minors do not have legal capacity to receive notice or exercise their right to opt out, I actually don't think those minors who did nothing would be bound to any of the determinations in this case.

I think with respect to minors who do participate and ultimately submit claims, that we would want to make sure that those minors did so on behalf of appropriately represented next friends and guardians. And the reference to the settlement procedures is not to say that that satisfies this here but rather to demonstrate that this can be efficiently done on a very large scale basis.

THE COURT: But you're suggesting that I think in a 75-day period or something -- I don't have the exact trial plan that you submitted right here. But what you're suggesting for an opt-out class is that we would have a master guardian ad litem and panel GALs who would go out and find all these children during the notice period and then either determine that they're going to participate or opt out.

But we're not sending anyone out in Flint to search for children. They found lawyers. So there's a -- many

individual cases filed on behalf of children and we're appointing next friends where appropriate. But no one's going out to search for these minors, which I think your trial plan absolutely would require. And I don't know how it could be done.

MS. LEVENS: We did not mean to require people to go out and search for minors. However, I will say that a lot of the minors who registered to participate in the settlement, they learned about it because we did have a very robust notice program. And we did reach out to alert those minors of their rights.

I think that a concern here in our desire to protect children, there's this hope of excluding them from everything. And Veolia in its opposition brief references the fact that the statute of limitations is tolled for children for a year after they turn 18.

I think that it's important to recognize today that -- just today, as we're addressing this procedural motion, the sixth graders who were exposed to this contaminated water, they're turning 18. And they're applying to college. And they are applying for jobs. And right now unless they are also -- if they are excluded from a class, unless they are also immediately filing their own lawsuits, they lose their right to have justice here. I think that --

THE COURT: But those are big ifs. I -- and what I'm

worried about is why wouldn't the minors who don't opt out be bound? That seems like a greater worry to me.

If what your concern is expressing is you want every minor child who was exposed to lead tainted water during the water crisis to have an option for recovery and you're looking for the greatest vehicle to accomplish that, it seems to me that the minors who don't opt out would be bound by an opt-out class and would lose out entirely forever and for always. And those who are still minors wouldn't have a chance to file their own lawsuit after they turn -- up until their 19th birthday.

Why isn't that a bigger problem?

MS. LEVENS: I think that in weighing those problems, we regarded it to be a bigger problem of minors attempting to adjudicate claims years in the future that -- after, frankly, the evidence is stale.

I think to the extent the Court genuinely has concerns about binding current minors, we can define them out of the class. But as a practical matter, their most likely path to recovery is to proceed as an absent class member. I also --

THE COURT: How can you define them out of your subclass? Wouldn't that be a failsafe class if you define the class as people who are in the class -- who had damages --

MS. LEVENS: The minor subclass actually is only

limited to younger children. We don't propose a class-wide method of damages for older children. I think to the extent that there is some space there between children who are 10 and children for whom the statute of limitations have tolled, the class definition could simply state all adult residents or property owners who were exposed to the water. And we could define adults as to now as opposed to the time of the crisis.

THE COURT: Okay. All right. That's interesting. And then I guess we still have the question of -- well, going back to what you said a moment ago that if a child who was a minor at the time of the crisis and a minor at the time of certification opts out or would not be bound somehow, that they -- the evidence would become stale.

And if what I'm looking at at this point would be an issues class, they wouldn't have to -- each one wouldn't have to come into court and determine whether duty, breach, and causation of toxic water had happened. And their own evidence seems to me could only get stronger in terms of what the impact of the lead is individually when they prove their own individual levels and harm that they suffered.

MS. LEVENS: It's true that if we are successful on liability that they would not have to establish those elements.

THE COURT: Okay. So I'm -- the stale evidence issue seems --

MS. LEVENS: More relates to damages.

THE COURT: Okay.

MS. LEVENS: And so could be protected by simply defining them out if that is a concern of the Court.

I do think, you know, Michigan law, the restatement, they recognize that often fact of exposure and items like that are proven using class wide or, excuse me, circumstantial evidence. Even for the minor subclass, that is children under 10, the additional elements that we are seeking to establish as to them are more along the lines of fact of injury as opposed to ultimate damages.

So I think even under our approach there is space for children and there would be a need to establish procedures to allow them to come forward, demonstrate their damages, and for defendants to assert any affirmative defenses against those specific children that they believe exist.

THE COURT: Okay. Let's talk for a minute about a (b)(2) injunctive relief class with respect to minors. And what you've told me thus far was about damages that somehow you're viewing this as a way of safeguarding a right of action for minors. And from my perspective, I don't think whether it safeguards or not that Michigan law permits this, an opt-out class for minors. For damages purposes.

But let's look at injunctive relief. Initially you had four types of injunctive relief you were seeking. And now

that this motion is with respect to only the engineering defendants, as I understand it you're only seeking medical monitoring for them. Is that -- from them.

MS. LEVENS: In terms of injunctive relief, yes, Your Honor.

THE COURT: Yeah. So it's your position, I would assume, that minors can sue on injunctive relief. That there's nothing in the rules enabling the act or Michigan law that would prevent minors from seeking injunctive relief.

MS. LEVENS: No. Even under expansive rule of whether substantive law versus procedure, the Michigan rules are limited to the damages property interest, not something like this, which is purely injunctive relief.

THE COURT: Okay. So you're looking at medical monitoring only with respect is to VNA and LAN, correct?

MS. LEVENS: Yes, Your Honor.

THE COURT: Okay. So I'm interested in how that's not actually a damages request. How is that injunctive relief when LAN and -- ordinarily injunctive or equitable relief is an affirmative -- you're going to do something differently. Like in the foster care class action cases on behalf of minor children, the foster care provider is going to provide food and safety and protection for these children in their care.

So there's something affirmative actions that they're doing.

How is medical monitoring not simply sort of damages in another package? Because wouldn't VNA and LAN just have to contribute money to a medical monitoring fund?

MS. LEVENS: No, Your Honor. Simply because injunctive relief costs money does not strip the relief of its injunctive character. While you're right that some injunctive relief is, you know, telling a company not to do something, others includes asking a defendant to affirmatively do something.

And there are always as a practical matter costs to that. There is a cost to cleaning up a site or creating something new. And in Boler actually, the Sixth Circuit was asked to opine on the injunctive character of medical monitoring and found this to be sufficient.

THE COURT: I looked back at Boler, and Boler -- the Sixth Circuit -- I mean, I've looked back at that several times in the motions to dismiss phase of Carthan and Walters and Sirls. There it was an Ex parte Young case against the state. The Sixth Circuit's pronouncement that medical monitoring, I think it was along with other injunctive relief qualified under Ex parte Young as forward looking.

Boler didn't decide that question with respect to LAN or VNA, or did they?

MS. LEVENS: No, Your Honor. And I did not mean to represent that they did. We do think though that the analysis

would be exactly the same. This is asking for an order requiring LAN and Veolia to do something going forward in the future and it will admittedly be a cost to them but that does not mean that it does not qualify as injunctive relief.

THE COURT: And so what would that -- what would this medical monitoring look like?

MS. LEVENS: Essentially the creation of a program to allow different forms of testing for children assuming that we had established that there is actual injury to children.

THE COURT: Right. Okay. Let me ask you this, in terms of (b)(2) classes, the Graddy, G-R-A-D-D-Y, versus Blue Cross Blue Shield of Tennessee, states that the homogeneity of the interest of the members of the class is mandatory.

And here the Graddy -- well, in that case, the Graddy court had refused to certify a (b)(2) class of individuals with autism spectrum disorder because they had such varied problems. And the treatment that they were seeking to have paid for was going to be different for each person. They may need it, they may not need it. They may need some of it and not all of it.

So how is this not just like that?

MS. LEVENS: Well, as a starting matter, I will say I don't remember the Graddy case off the top of my head.

THE COURT: That's okay.

MS. LEVENS: But from your very helpful factual

summary, I will say that the medical monitoring requested here would help all children to assess the exact extent of their damages which would help them to then have individually tailored programs.

Our experts have established that all of the children were exposed to lead and that this causes damages. But Your Honor is right that what those are could be different for different children. And medical monitoring --

THE COURT: This is injunctive relief. This is not damages relief. It's -- I mean, we have to show that they were damaged, but ...

MS. LEVENS: Yes. Well no, but the medical monitoring helps with an assessment of the children to determine the exact nature of their injury. Which I think is helpful on many levels including practical ones such as behavioral therapy and educational modifications and things of that nature.

THE COURT: Okay. All right. Well, those were some of the questions I have. Let me look a little bit more.

You know another issue that the cases bring to my attention is that injunctive relief in class cases needs -- is only. So if that's the only type of relief for a minor's class, it has to be set -- it has to be the primary relief, not secondary to monetary relief.

Now here we're talking about minors who would also

qualify for, potentially if liability is shown, for significant money damages.

How would this injunctive relief be secondary to money damages?

MS. LEVENS: I think it would be secondary because it would only be in the event that the Court declines to certify a (b)(3) class of children. I think a lot of that primary and secondary language really grew out of Walmart in which the fact that the plaintiffs were seeking both declaratory and equitable relief, which results in money to children, that that meant they needed to qualify for (b)(3) certification.

We have simultaneously asked for that and we think the Court could grant it. But in the event it did not, it would not be using (b)(2) as a vehicle to inappropriately certify and allow a damages claim for children.

You'll notice we're not seeking injunctive relief in the form of paying for their college and sports cars and things like that that would really be in lieu of damages here. This is solely to create a program to help these children going forward.

THE COURT: So the purpose of the medical monitoring is to ascertain damages.

MS. LEVENS: Well, not just damages really. The extent of their injury and also what could be done to help them going forward.

THE COURT: Okay. Okay. Well, why don't I turn to Mr. Campbell to tell me who is going to respond to this from VNA, because I didn't write it down.

MR. CAMPBELL: Sorry, Your Honor. Mr. Minh Nguyen-Dang is going to address the minor subclass.

THE COURT: Thank you.

MR. NGUYEN-DANG: Good afternoon, Your Honor.

As you have recognized correctly, there are substantial protections under Michigan law for the claims of minors. And as you have recognized correctly, that means that a (b)(3) class for damages simply wouldn't be feasible in this case in a way that would protect the Michigan protections. But there was a suggestion that a (b)(2) class might be permissible because there might not be a Rules Enabling Act problem with that. And we're not sure that that's the case.

THE COURT: I'm not sure it's the case either. Yeah. So tell me why not.

MR. NGUYEN-DANG: So under the Michigan rules, it's the claim itself that is the property of the minor. And that claim here is a claim for professional negligence. Injunctive relief is merely the remedy sought, one of the remedies sought for that claim. But the claim itself is still the same claim.

It's the same claim under (b)(3) as it would be under (b)(2). And that's the claim that is protected by the Michigan protections as we've mentioned the individual

appointment of representatives, the statutory tolling of the statute of limitations. And so it doesn't seem to be that the (b)(2) class is situated any differently than the (b)(3) class.

At the end of the day, what plaintiffs are seeking is some adjudication, the results of which would be binding on minors. And that is exactly --

THE COURT: Mr. Nguyen-Dang, I've gone back and forth on this, and I'm glad to hear your argument. But I have to think that the Michigan law would require injunctive relief. If that were the sole purpose of a lawsuit with respect to minors it would just be crazy.

Let's say the minor is 2 years old in a foster care home that needs to be halted from doing a particular act and required to do it differently in the future. So that's the injunction. And it would make no sense to require the child to be at any time up to 19 they can bring this case and follow all of the procedural and substantive safeguards that personal injury lawsuits allow, because the time period would have long gone by for any meaningful relief.

So if that's what Michigan -- is that really what Michigan law requires?

MR. NGUYEN-DANG: In the situation that you describe, Your Honor, you wouldn't need to do what you would need to do here. The situation you described is of classic injunctive

relief. The plaintiff would be seeking an order that runs against the foster system to do something differently. That would not require individual appointment for every single minor because if one minor were to get that order --

THE COURT: Right.

MR. NGUYEN-DANG: -- it would apply to everybody. So you would only need to --

THE COURT: I'm sorry. For the injunctive relief, would we need next friends appointed for the minors if this injunctive relief is going to be citywide for anyone who was a minor during the time period at issue? And we'll figure out whether it goes to 2016 or '15 or what.

But would we need next friends appointed?

MR. NGUYEN-DANG: We would here. Because as the Court has already recognized, the character of the injunctive relief or what plaintiffs are characterizing as injunctive relief doesn't really feel like injunctive relief at all.

THE COURT: Yea.

MR. NGUYEN-DANG: Really it's an evidentiary foundation for a later damages claim. As Ms. Levens explained, plaintiffs aren't actually seeking the ultimate treatment for any plaintiff, they simply want to diagnose each plaintiff or each member of this proposed subclass so that then the proposed subclass could use that in a damages claim in order to get the money or a second injunction that would

address their treatment needs.

So because of the highly individualized nature of what it is that plaintiffs actually are seeking in this case, this isn't truly injunctive relief. It's really more, as the Kartman case explains, an evidentiary foundation for damages. That's governed by (b)(3), not (b)(2). And so as we've all agreed, the Michigan protections would apply in that case.

THE COURT: Okay. Anything else on this issue?

MR. NGUYEN-DANG: There is one thing that Ms. Levens brought up. I just wasn't exactly sure exactly what she meant, so I would appreciate the opportunity to clarify it.

THE COURT: Sure.

MR. NGUYEN-DANG: Which is this idea that somehow you can have a class in which some members -- a class for minors in which some members would not be bound somehow --

THE COURT: I don't know how that works.

MR. NGUYEN-DANG: Well, that seemed to sort of completely defeat the purpose of a class action or at the very least turn it into a type of opt-in litigation, which is, again, not the point of a class action and is not permitted under Rule 23.

There also was I think a concern about stale evidence. Now we're not really sure how or what that means in the situation either. All of the evidence as relates to what VNA did, for instance, all of it has been collected. People

have -- all the documents have been produced. All of the key witnesses have been deposed.

So the evidence left, as Your Honor mentioned, would be the evidence personal to each minor as to their injuries. And as you mentioned, that would probably only get stronger over time. At the same time if there's any evidence going to that such as blood lead levels or water lead levels, if they don't exist now, they never will exist. So it's not as though there's any problem with that evidence either.

And I think there was a final concern about safeguarding the rights of minors to bring their claims. Those rights are safeguarded regardless. If you are a minor, the statute of limitations is tolled until you are 19. If you have already become an adult, were the class -- were the Court to deny class certification, then under the American Pipe they can bring those claims as adults.

So really there isn't any concern about any minor not being able to have their day in court if they want to.

THE COURT: The concern as I read it in plaintiffs' materials was the fact that some have not done so thus far. And so this would be a way to capture those individuals who have for any variety of reasons not yet obtained counsel and filed suit.

MR. NGUYEN-DANG: It just seems to us that it is unduly speculative to think that those people would not bring

a suit once they turn 18.

THE COURT: Yeah.

MR. NGUYEN-DANG: Perhaps they don't think they have claims yet, but they might. As you say, their claims might develop. At any rate, they have until when they turn 19 to do so. So it seems to us at this point it's just premature to think that anybody who hasn't brought suit, it's for some reason other than the fact that they might be waiting. As the lieu allowed them to.

As we discussed, the normal course in Michigan law is for minors to turn 18 and then to decide to bring the cases themselves. If they haven't done so yet, they still could.

THE COURT: Okay. Thank you. Mr. Wittie.

MR. WITTIE: Thank you, your Honor. I'd like to return to some of the basic principles underlying (b)(2) and (b)(3) classes. In the Walmart case, the Supreme Court clarified that any time that anything other than incidental monetary relief as sought in a case, that the requirements of (b)(3) have to be satisfied not simply the requirements of (b)(2).

This is certainly a case where the plaintiffs seek more than incidental monetary relief. Even if you're only considering the medical monitoring request, that in itself is as far as we're concerned a claim for monetary relief certainly from the perspective of the two defendants here

because all they're being asked to do is to pay money.

It is not a program that they're being asked to order to be established. It's not obviously a negative injunction. The entire requirement would be satisfied for either defendant by writing a check. And that is, by definition, not injunctive relief.

As the Third Circuit said in its Jaffee opinion back in 1979, a plaintiff cannot transform a claim for damages into an equitable claim by asking for an injunction that orders the payment of money. And that is the only order that the plaintiffs are seeking with respect to these two defendants.

So there's no dodging the fact that the Court is going to be having to look at (b)(3). And if (b)(3) is the determining subsection, then of course we run into all the problems that the Court has identified. And it's clear it cannot be overcome in this case.

I certainly agree with Mr. Nguyen-Dang that the property right here that we're talking about is the claim or the cause of action that's involved. And I think it's also important here to recognize the medical monitoring in the State of Michigan is available only as a form of essentially future medical.

It's not a standalone cause of action. It's available only for those claimants for whom a completed tort has already been proven and established. And so there's no

getting around -- there's no use of the medical monitoring remedy simply to find out that if you have a cause of action or you have a claim.

Now I know that plaintiffs think that they can establish by common evidence the fact that every member of this very strangely defined minor subclass has got an injury. But what they're forgetting in all of this and what must be kept in mind is that the defendants get a turn too.

The defendants get to show by individual evidence, if they can, that a particular member of this subclass has not been injured at all or as a result of any of their actions. And if they can establish that through individual evidence then that particular child, that particular minor would not be entitled to the medical monitoring remedy in the first place.

So you can't have a situation where you are giving medical monitoring to someone you have not already established has a legal right to a remedy by proving all of the elements of a tort including causation and injury.

So in a lot of ways, the entire trial plan absolutely puts the cart before the horse and essentially would deny the defendants' due process rights to contest these matters on an individual basis as the evidence clearly shows they would have the -- the defendants would have the ability to do in this case.

THE COURT: Let me ask Ms. Levens to respond to that

particular argument. And it stems from the Henry v Dow Chemical Company case that says mere exposure to a toxic substance and the increased risk of future harm does not constitute an injury for tort purposes. Rather it is a present injury, not fear of an injury in the future that gives rise to a cause of action under negligence theory. And that's a 2005 Michigan Supreme Court case.

MS. LEVENS: Yes, Your Honor. Plaintiffs in our briefing recognize that we need to show a current actual injury, not just the potential for a future injury. Our experts have established using accepted methodologies that all children in Flint were exposed to lead and as a result were damaged.

I also think regardless of whether or not the Court certifies a (b)(3) class of minors, in the event that there is a successful liability determination, defendants will have their opportunity to bring forward individual defenses whether it's against individual class members in some kind of coordinated proceeding or as to any certified subclasses.

To the extent that a minor after that process would be deemed to have not be injured or damaged, they would not qualify to partake in the medical monitoring program. So I think that this is distinct in that way.

THE COURT: Okay. Thank you.

Is there anything else you wish to respond to from

Mr. Wittie or Mr. Nguyen-Dang?

MR. NOVAK: May I speak for just a quick moment in an additional response?

THE COURT: Oh, Mr. Novak.

MR. NOVAK: This is Paul Novak on behalf of class plaintiffs.

THE COURT: Sure.

MR. NOVAK: To your question about Henry v Dow, there's also a neurotoxicological difference between exposure to lead in this instance and the exposure that was at issue in Henry v Dow.

In that instance, dioxin may be carcinogenic and cause cancer, but it does not cause cancer in everyone who has been exposed to it. And so the injury question is still individualized.

Lead, on the other hand, the overwhelming scientific literature demonstrates that there are really no children who, when exposed to lead, are not injured in some fashion. And so I think that is an important factual and neurotoxicological distinction between the current case and Henry v Dow.

THE COURT: Thank you, Mr. Novak.

In other words it's something that plaintiffs have said all the way through this case. There's no safe level of lead to be exposed to. Okay. Thank you.

MR. NGUYEN-DANG: If I might respond to that, Your

Honor?

THE COURT: Sure.

MR. NGUYEN-DANG: Just a couple of thoughts. The first is, as you know, plaintiffs here, their case depends on a series of experts. And we have not actually completed the briefing on those experts. And we have challenged all of them and we have explained in extensive details the flaws in their methodologies.

THE COURT: I'm aware of that.

MR. NGUYEN-DANG: So to the extent the Court wishes to certify any class that depends on those opinions, we would have to complete that process first.

THE COURT: Yes. And I'm glad you reminded me of that. Because at the conclusion of our hearing today, I want to talk about my thoughts on I think we have 12 remaining Daubert motions challenging -- well, we had 14 challenging all 14 of plaintiffs' experts. Two of those were addressed in a hearing a couple of weeks ago and we have 12 left.

So my thought, I'll just put it out there right now so you can think about it, is that for those that I don't need, and this particular issue if I do think that a class is appropriate for injunctive relief for medical monitoring, if I do think Michigan law supports that, I would probably have to rely on I think it's Dr. Hu, H-U. In which case -- is that the right person?

MR. NGUYEN-DANG: Yes, Your Honor. But then also the chain of experts that lead up to Dr. Hu. So Dr. Goovaerts, Dr. Weisel. There might be another -- Dr. Lanphear.

THE COURT: Okay. Good point. So if I were to think that that's the direction to go in, I would finish the briefing on that and hold those hearings first.

And my thought is that if I don't go in the direction, in that direction, then what I would do is deny as moot the 12 motions and ask the parties to go back to the meet and confer table to put together an amendment to our case management order that would discuss when those would be re-filed, if they're going to be used in later stage, and when those would be addressed.

So I'll just put a placeholder to have you all thinking about that.

MR. NGUYEN-DANG: That makes sense, Your Honor.

THE COURT: Good.

So Ms. Levens, was there anything further? I think Mr. Novak responded.

MS. LEVENS: Mr. Novak did an able job, unless Your Honor has questions.

THE COURT: Not right now.

So what we'll do is take about a four or five minute break. So please don't log out and then we have to put you back in. You can turn your cameras and microphones off and

we'll be back in five minutes.

(Brief Recess)

THE COURT: We're back on the record. And we will be turning to whether a (b)(3) damages class can be certified.

MR. MORRISSEY: Your Honor, I'll be addressing that issue.

THE COURT: Okay.

MR. MORRISSEY: And if you'd be inclined to hear it I'd be happy to start with an overview argument before any questions.

THE COURT: Sure.

MR. MORRISSEY: Defendant's opposition to the (b)(3) damages class relies largely on a myth that classes are not properly certifiable in mass tort cases. There's a robust body of case law both within the Sixth Circuit and across the country that shows that assumption is false.

There are two paths that courts have taken within the Sixth Circuit in cases like this one where the core liability issues of duty, breach, causation are common. One is the path that the Sixth Circuit recently confirmed in Behr where the court, the district court elected to certify a (c)(4) issue class.

The other is the more common path recognized by Whirlpool and Bentley and Sterling and other cases throughout the country. Certified a (b)(3) class allowing the case to

proceed through summary judgment and towards trial and a trial whichever issues may be adjudicated collectively and then allowing any individualized damage issues to be resolved in subsequent proceedings.

This case falls into that second category with respect to the property subclass for several reasons.

I think one case that's particularly instructive that we cite in our case is the Cook v Rockwell International case from Denver involving the Rocky Flats nuclear arsenal in the Denver area. That litigation went on for two decades.

There was a class trial at one point that resulted in a verdict in a class action after trial that included diminution and property value claims arising from exposure to radioactive materials from that site that flowed into surrounding areas.

That case went up to the Tenth Circuit. The class action decision at one point was decertified. It was then went back down to the district court. It was then revised. It went up to the Tenth Circuit which remanded with instructions to reconsider class certification again. And while that decision was pending and the Court was considering reinstating the verdict, the case settled. Fortunately for this case --

THE COURT: Let's not talk about cases that take 20 years.

MR. MORRISSEY: Hopefully we don't get there. And the reason we don't need to get there here is that we have a robust damages model for the property class that calculates damages in several methodological ways.

And it's predicated by -- and to go back to Your Honor's question from the beginning of the day -- a common evidence of exposure to highly corrosive water on a uniform basis throughout the class area. And that's from Dr. Russell's report which has already survived a Daubert motion.

And in this portions of his report was not even subject to a Daubert motion. At pages 13 and 68 to 72 of his report, what Dr. Russell opines is that everyone in Flint was as a result of these engineers' conduct exposed to highly corrosive water that compromised pipes and fixtures. And based on that --

THE COURT: Didn't we also learn in looking at that briefing -- at that report and the briefing surrounding it that every individual home had different type of solder, different -- many had a variety of different types of pipes at different points? Is it not quite individualized for each property?

MR. MORRISSEY: There are some individual allocation issues, which is common in any class action.

THE COURT: Right.

MR. MORRISSEY: That there are variations with respect to the amount of damages. But there are methodologies here for calculating aggregate damages and then the amount that any particular person would put in for a claim would be the subject of a subsequent proceeding.

And the key here is that every brass fixture up until 2014, the beginning of this class period, there aren't homes in this period that were built after that. If there were, they can't be more than a handful of homes built in Flint in 2014/2015.

Brass fixtures had high lead content up until 2014. And every brass fixture in the community was subjected to highly corrosive water that compromised its integrity. And the only way to address it is replace those in each and every home. Some homes also had lead solders. Most of them did because that was the case for all homes up until I believe it's 1996.

So almost all of the homes in the class area also have lead solders. And then there's the 20 percent of homes that further were serviced by lead service lines. So we have -- and that's the predicate for the Gamble/Pogorilich class-wide damage model that requires replacement of pipes and fixtures throughout the class area and provides the methodology for calculating those damages.

That's one of the two categories of classified

damages. The other is Professor Keiser. Professor Keiser is an economist who's done something that is very rare --

THE COURT: Let me ask you -- let me just go back one step to make sure I understand. So what we're now talking about is the subclass of property owners, residential property subclass. Tell me what the types of damages you're seeking under that subclass are.

MR. MORRISSEY: Yes. The first category which I just mentioned is those calculated by Mr. Gamble, which are replacement of pipes and fixtures in homes throughout the class area. And he then quantifies that. He's assisted by Pogorilich who offers a separate opinion that categorizes the cost of some of the categories of remediations that are required.

The second category is based on Professor Kaiser's regression analysis of the diminution and property values throughout Flint which concludes based on a statistical analysis that he actually conducted before we ever met him. This is one of the -- certainly the only case in my experience where I encountered an expert who'd done nearly all of the work needed for his expert report before I ever contacted him.

He had -- this is something that Professor Keiser along with his colleagues who are all Yale trained economists -- Professors Christensen and Lade -- had studied the economic impact of the water crisis on residential home

values in Flint comparing them to control cities that had similar demographic and economic characteristics for the same period.

And then quantifies, A, that each and every home was impacted by the crisis. And B, the amount of that damage. He does that on a class-wide basis. He also opines that he could in a rather straightforward fashion measure the amount people paid out of pocket for water bills. That's a third category of damages.

So we have Professor Keiser and his opinion, which is based on largely the existence of the Flint water crisis and the question of whether defendant's professional negligence caused it.

Then calculates harm on a class-wide basis to the residential property subclass, the definition of which I guess could be tweaked to clarify that it includes people who purchased homes after April 2014 and before the end of the crisis. Those people are already subsumed within the definition. I wouldn't agree we Mr. Bishop's characterization that it's some fundamental flaw in the proposal for our certification of this class. It's simply a tweak to the notice language.

THE COURT: So what I hear you arguing is that you have powerful evidence in statistical form about the diminution and value of Flint homes, the lack of value in the

water that individuals paid for.

But doesn't -- wouldn't this still require highly individualized and particularized inquires and evidence related to whether a particular home has a brass fixture or a lead solder? Why wouldn't that overpower the big picture?

MR. MORRISSEY: I think the analogy could go to any number of class actions where there are individualized damage inquiries that would take place after trial, after the polyurethane foam case that involved any direct and indirect purchaser of polyurethane foam throughout the country. The auto parts class action in Detroit that involved every conceivable component of an automobile and classes of direct and indirect purchasers of those. We do as much as they --

THE COURT: But there we know that every plaintiff or every claimant, every individual in that class was harmed by polyurethane or whatever it is. And here we know that the lead was -- I mean, the water was corrosive. We know there were high lead levels. But as I understand it, it was still quite varied here.

So you're saying, well, this is just like the polyurethane or having a bad part in my car because we know there was harm and then I have to show in the auto parts or the polyurethane was the harm was to me.

MR. MORRISSEY: Based on -- the combination of Russell and Gamble get you that each and every member of this

class needs the pipes and fixtures in their home replaced on a class-wide basis. And the aggregate amount of those damages that allows you to proceed through trial on liability and aggregate damages on a class-wide basis.

Of course if we get there, the defendants have throughout claimed they did nothing wrong. And presumably in our case we'll bring a summary judgment motion at some point. And if they prevail on that, we obviously don't get there.

THE COURT: Well, you have a preview of that motion because it's been filed in the bellwether cases by both defendants.

MR. MORRISSEY: Understood. And we welcome the opportunity to respond to such a motion in due course based on the evidence throughout discovery.

THE COURT: Okay.

MR. MORRISSEY: But all of those issues through summary judgment, through trial, through aggregate damages on Gamble's methodology and on Keiser can be adjudicated on a class-wide basis.

And sure, just as some purchaser of foam or some independent car dealer may have more purchases than others and some person might have a bigger house or a smaller house in Flint, at the claims administration phase after aggravated damages is when those allocation issues are proven up. And when the defendants will be able to, you know, put in

individualized defenses at that stage as well.

But there will be -- this is a case that as in the Rockwell case, as in -- as the court suggested could be done in Whirlpool, as in Olden, as in Bentley v Honeywell, as in a host of cases, the case is suitable for certification as a (b)(3) case. For proceeding towards trial with as much of it as possible for we believe proceeding through a trial on aggregate damages before there's any need for any individualized issue.

And it could well be that the case resolves itself as most do one way or the other before you get to that claims administration phase.

THE COURT: Yeah. But I can't assume that.

MR. MORRISSEY: No, no. But the question is what's the most suitable and efficient way --

THE COURT: Right.

MR. MORRISSEY: -- for this case to proceed.

Is this superior to the alternative of no case at all? Or endless mini trials of relatively small property claims? Is this something that can be done in a common class-wide fashion for the foreseeable future and likely through trial?

And a trial that in this case based on the evidence we've gathered and the evidence we would present at a trial, we think this case can be tried efficiently as to the

defendants' conduct, the harm it caused, the aggregate damages it caused to the class.

THE COURT: And what about defendants have told me that they have individualized defenses regarding intervening causes, superseding causes of lead poisoning with respect to individuals and their homes.

How would this not require mini trials in any event so that those defenses can be heard with respect to individual homes?

MR. MORRISSEY: I haven't heard any individualized defenses with respect to either corrosive water, anyone being exposed to corrosive water, or even the amount of whether corrosive water would result in lead contamination.

There has been a suggestion that there were periods where the lead content and in Flint was fine in prior periods before the crisis. There's this sludge analysis that Dr. Edwards does. That's not a defense to the fact that there was corrosive water during this period as a result of the defendants' conduct that was sufficient to compromise these pipes and fixtures such they need to be will replaced.

It's essentially an eggshell plaintiff defense that's not tenable as a matter of tort law. And whether that eggshell plaintiff defense is tenable as a matter of tort law is a question that may well be adjudicated on summary subject. It's not a question that's ripe for consideration now or that

bears on whether the class should be certified.

THE COURT: Okay. Thank you.

And Mr. Campbell, who's responding on this issue?

MS. PEASLEE: Your Honor, before --

MR. CAMPBELL: Bishop is.

MS. PEASLEE: Oh, I'm sorry. I was just going to say before you respond, if you have questions specific to the business subclass, I'm happy to respond to those. But I will say that Mr. Morrissey has done a very able job with respect to property. And candidly I would expect your line of questions for businesses to be very similar and our responses are as well. So I'm also happy to --

THE COURT: Okay. I'm glad you brought that up. Because with regard to the business subclass, I think the briefing was even more insistent or that there would be -- that some businesses suffered, some didn't suffer, some suffered for a little while, recovered quickly, didn't recover. Some required water. Some don't require water.

I mean, how does the business subclass not really require mini trials as to causation of their damages?

MS. PEASLEE: Sure Your Honor. As we explained in Professor Simons' report, as with the case with property, you can assess the aggregate damages based on impact of the water crisis. And he does that by quantifying the effects of change in consumer behavior for restaurants and other consumer

oriented sub factors. And then once you --

THE COURT: So a shoe store. How's the shoe store doing during the crisis?

MS. PEASLEE: Your Honor, if what you mean by that is why would a shoe store be impacted by the Flint water crisis.

THE COURT: Yeah.

MS. PEASLEE: If fewer people are coming to Flint because Flint is now synonymous with poisonous water, then the shoe store may very well be impacted by that.

But your point is taken that different sub sectors, for instance a restaurant versus the shoe store, may not be impacted in exactly the same amount, which is why Professor Simons' report does look at sub sector by sub sector. Restaurants and shoe stores would be sub sectors.

But taking that, then I think the point that Mr. Morrissey made with respect to property and the fact that certain businesses may have some preexisting factors that make them more susceptible to harm is not a defense under Michigan tort law to simply negating liability.

THE COURT: Oh, absolutely not. No. I wasn't thinking that. I'm just looking at what's a superior method and where are the common issues in terms of damages, whether there are more individualized issues such that individual lawsuits make more sense in this area or not.

Are there any ways in which we're materially advanced

on a damages by having a damages subclass or whether we still would have to have the same amount of effort go into individual determinations.

So I'm not doubting at all that with respect to Mr. Morrissey's group of homeowners that there was serious consequences for them or for your group of commercial entities. I'm not doubting that at all. I'm only trying to figure out what's permitted under the Rule 23 jurisprudence in a situation like this where there are some highly individualized determinations about causation.

But so that's where we are. But thank you. I'm glad you spoke up.

MS. PEASLEE: Thank you, your Honor.

THE COURT: Yes. Okay.

So where were we for a response? That's Mr. Bishop.

MR. BISHOP: Yes, Your Honor. Thank you.

Obviously we agree with you, Your Honor, that we don't think the case should get past summary judgment because we don't think there's a duty here. But were there to be a trial, what Mr. Morrissey has described is a fantasy.

It's a fantasy because it assumes that his experts are correct with their theories. But we know that they're not, all right. Cause Dr. Gardoni did not even address injury or causation.

And the Russell claim that all pipes and plumbing

were irreparably damaged has to be judged in the light of our expert's contrary review. Duquette and Gagnon. And what she stated was to review evidence of inspections of two class representations, Davis and Kelso, and concluded that in neither of those properties was there any significant damage to the properties from corrosion or lead.

And we would be entitled under Lindsey and Normet, which gives us a constitutional due process right to introduce individualized evidence to rebut these expert claims. We have a right under the Rules Enabling Act not to be foreclosed in our ability to present our defenses by the use of the class action device to do that. And we certainly would. Because we believe that these expert reports can be refuted by showing that individual's, some did not suffer injury toward.

This is not a question just about damages. This is a question about fact of injury. Some were not injured. And they were injured in different -- those who were injured were injured in different amounts. And it's --

THE COURT: And I guess what we're talking about, Mr. Bishop, is not adult personal injury. And let's assume right now that a damages subclass cannot be certified for minors.

MR. BISHOP: Right.

THE COURT: So now we're only looking at what Mr. Morrissey and what Ms. Peaslee talked about.

MR. BISHOP: And that is what our experts Duquette

and Gagnon did. They reviewed evidence from inspection of two class reps' homes, their properties. And they concluded that there was no damage to those properties.

And we will be entitled to repeat that exercise to refute this claim that all properties were suffered injury and that they all need to have their pipes replaced. We don't think that's the least bit plausible and nor do our experts.

I should just say, Your Honor, and just go back to a point that you discussed with Mr. Nguyen-Dang earlier that the plaintiffs' claims about property damage and business losses depend on four experts. Simons, Keiser, Pogorilich, and Gamble that Mr. Morrissey has mentioned.

We haven't finished briefing the Dauberts on them. We haven't had argument on the Dauberts. You haven't decided the Dauberts. So no class -- no (b)(3) class on those two classes can be certified.

But we don't think that there's any need to complete those Dauberts in order to deny these (b)(3)s. Because they can be denied on the basis that causation, injury, and damages are all highly individualized. And the idea that this can all be done in a few week trial depends on the fact --

THE COURT: No one said a few weeks.

MR. BISHOP: Well, I think plaintiffs have at some point said that. That we will be foreclosed from presenting our individualized evidence. When we do present that

individualized evidence, this becomes a highly unmanageable trial and certainly not superior to the alternatives.

And the damages that are being alleged here are not insignificant. What the plaintiffs claim is that basically you have to rip out all the plumbing and all the supply lines to homes and to replace them. Not an insignificant cost presumably. And they're claiming using some uniform formula across 26 different types of business loss of revenues there.

I should talk about that evidence relating to lost profits. So that depends on Dr. Simons who selected these 26 industry sub sectors. Our experts challenge that. But essentially what he's done is to look at their revenues and say that anyone who's lost revenues, lost revenues as a result of the crisis.

THE COURT: Right.

MR. BISHOP: And that's obviously wrong because one of the named plaintiffs, 635 South Saginaw, did not lose revenues but they claim that they're entitled to damages here.

Plaintiffs' response was to say that Dr. Simons could supplement that analysis using business income statements. What that proves I think is what is obvious here, which is that a loss of revenues doesn't tell you anything about the connection between the business's success or failure and the Flint water crisis.

It shows that the analysis is individualized. It

will depend on the overall economy. It will depend -- in that particular sector. It will depend on the aptitude of the particular business owner. The fate of a business in the face of a crisis cannot be determined when some formulaic fashion. And we will be entitled to investigate as to each business claimant, the reasons for any loss of revenue or profits that they have suffered.

So I say allocation of fault here, which Your Honor mentioned, is individualized as well. Determining whether VNA's conduct was a substantial factor in causing injury --

THE COURT: But VNA can show that at trial. You can -- at trial you've already filed multiple nonparty notices of fault. And so you'll certainly be entitled to assign fault to others at trial.

MR. BISHOP: Yes. But that will depend not just on the relative conduct of others and the timing of that relative conduct of others, but also the nature of the specific injuries for the individual plaintiffs. So it's not -- it's individualized issue.

So what you have here is individualized issues in which we're entitled to investigate at trial involving fact of injury, causation, not what the sliver of causation that you discussed earlier that we'll be talking about on the issues class which we don't think can be certified there even. But real causation. Causation in fact. Proximate causation of

injury. And damages and allocation of fault.

And you know it's telling that Mr. Morrissey's example, he starts off with Rocky Flats, a case that twice went on 23(f)s to the Tenth Circuit. And this analogy to Whirlpool is also telling. Because this case is much more like American Medical than it's like Whirlpool.

So Judge Stranch explained in Whirlpool that not only were there common issues as to whether Whirlpool had a duty to warn of the mold risk and whether it breached that duty, but that the mold problems occurred regardless of the model of washer and regardless of consumer laundry habits or remedial efforts.

And so the injury and damages questions were common to all of the consumers. We would show here at trial that that is not the case. Our experts have shown that that is not the case.

So we don't think that a (b)(3) class can be certified on the say so of highly contested evidence from experts who we think are wrong and the reputation of who will take the form of experts on our side who analyze individualized facts about the plumbing, about the supply lines, about the value of the properties, which of course is going to differ.

In fact, there is no injury to someone's whose property, even if it was devalued, if they didn't try to

monetize that property during the class period and if the property returned to the full value later. Valuation questions have to be determined in the context of the broader market on what is happening in the economy. The features of the particular property.

THE COURT: Okay.

MR. BISHOP: In those cases like Gates and Ebert do not allow, in fact very rarely, a property classes certified because of those valuation issues.

So you know, in American Medical, the defective prosthetics varied from plaintiff to plaintiff and their injury could be attributed to different actors, different actions. That's true with regard to both the property, proposed property class and the business classes. So we don't think that a (b)(3) is appropriate for either of those.

And that since highly individualized inquiries will dominate at any trial, that is more effective to treat these on an individualized basis and have individual trials particularly in the context which we'll talk about more when we talk about issue passes of the existence of a robust process already in place for individuals.

THE COURT: Okay. Thank you, Mr. Bishop.

Do we have any -- do we have Mr. Wittie? Anything you want to add?

MR. WITTIE: Yes, Your Honor. And I'll try to be

brief because I mostly agree with Mr. Bishop's statements and I'll try not to repeat these, repeat what he has said.

I think it is important to conceptualize the things we've been talking about back in terms of the Rule 23 requirements. Plaintiffs believe that just because they have produced, you know, what they call a common class-wide evidence of injury, that that concludes the issue in their favor as far as class certification is concerned. But that's an incorrect view of Rule 23.

It would if these experts' opinions were ultimately deemed admissible by the Court or even accepted by the Court as credible in terms of predominance. It would not, you know, determine the substantive issues in the case.

The defendants would still be entitled on an individualized basis to show that a particular property was not affected by the actions of the defendant with regard to the Flint water crisis. Would be entitled to show that, for example, that previous water or lead spikes was the cause of the property damage where property damage did, in fact, occur.

There are many other individualized assessments that would be made at the pre damages stage. And there's no way consistent with due process that this can be done on any way other than an individualized basis.

And the Court must recognize that when considering whether the predominance requirement, which is as the Court is

aware is a qualitative requirement which basically requires the Court to imagine how the trial of that particular claim would actually be conducted in real life.

And that's what the Sandusky Wellness Center case of the Sixth Circuit teaches us. And that includes evidence purely, you know, brought in on a defensive issue or to rebut an issue like this upon which the plaintiffs have the burden of proof as it was in, again, the Sandusky decision. Those have to be taken into account too both in determining whether predominance and superiority exist.

Now here I think it's a legitimate question about whether the plaintiffs have even shown that fact of damages is a common issue that they have any common evidence of damages. All they have is aggregate evidence of damages for both the property value and business damages proposed subclasses.

THE COURT: Well, I think they're saying that if we have powerful evidence of aggregate damages, the individuals that make up the aggregate must have suffered and there will be a separate process to determine the allocation of any damages award. I think that's the way I'm seeing it.

MR. WITTIE: Well, that would be an impermissible inference.

THE COURT: Well, possibly.

MR. WITTIE: To state that simply because there was some loss of business in Flint over a particular period of

time, and even if some of that loss of business could be fairly attributable to the Flint water crisis, and even if some of that were attributable to the defendants, then a particular -- particular business's loss must therefore in some degree have partaken of that aggregate loss.

That's a fluid recovery type theory that the courts have routinely rejected in cases like this. And I would point the Court to the McLaughlin v American Tobacco case from the Second Circuit that we have cited as well as other cases.

Now the types of cases where this kind of aggregate award have been permitted are like in the antitrust field where everyone has been harmed the same way. If you purchased a particular product, which was subject to an antitrust violation, then every purchaser by definition, assuming they meet the class definition, would have sustained some level of harm and therefore you really only have a quantum issue by definition.

But that's not necessarily true in a pollution type situation or, you know, in a product situation where the allegation is not simply risk of loss like in Whirlpool where the risk itself lead to, you know, diminution of value of the product relative to the value that the consumers paid for.

So it was an entirely different type of claim altogether. When we're looking at claims of this type, those type of aggregate damages awards are generally not permitted

and we don't think could be allowed in this kind of case consistent with due process.

Now with respect to the business subclass, I think it's fair to say that, you know, it's going to depend entirely on the kind of business that a person is doing. One can easily imagine a store doing --

THE COURT: Well, the response to that is, well, we had it broken down by general sectors of the economy.

MR. WITTIE: That's true, Your Honor. And I think it's telling that those sub sectors don't even cover the entire economy. And therefore is a tacit acknowledgment that some sectors wouldn't have sustained any loss at all.

But beyond that, you know, an individual store that sold bottled water, say, or filtration systems, you know, might have actually benefited from the Flint water crisis. It's impossible to tell on a mass aggregated basis whether the loss, even if we concede for the purposes of argument that there was an aggregate overall loss was sustained by any particular business.

There's simply no way of doing that without going into, you know, the records of those particular businesses. And if you have to do that in the individual cases, then you've destroyed every efficiency advantage that the class proposal would seek to foster and you've done no one any favors.

THE COURT: Okay.

MR. WITTIE: Just one thing on the water bills.

THE COURT: Sure.

MR. WITTIE: Because nobody has really talked about that very much.

THE COURT: About what?

MR. WITTIE: The water bills.

THE COURT: Oh, the water bills, yeah.

MR. WITTIE: The water bill theory. You know, that depends upon the assumption that the water that persons acquired was completely valueless.

THE COURT: Well, here's where your argument -- I think we should stop where you started. Here's where your argument I think gets into some difficult territory. Because your brief suggested that the water that was received, the lead tainted, fecal coliform tainted water that's alleged to have gone into people's homes was not without value because they used it.

And we live in a situation in the State of Michigan where we don't have a choice over our municipal water supply. So I can't say if I lived in Flint, I don't think I'll use Flint water. I think I'll use Ann Arbor water.

So you're suggesting that just because people continued and didn't just have the water supply cut off to their home that it must have provided them value? And I

just -- that's not the world I'm living in where you can just cut off the water and continue to live properly in our society. It just doesn't happen. So let's not go any further on that argument if that's the direction you're going in. Is that -- that was in your brief.

MR. WITTIE: Well, that's not exactly the argument that is being made.

THE COURT: Okay.

MR. WITTIE: And I will say that having lost my water supply as a result of the frequent storm down here in Texas a few days ago, I'm certainly sympathetic to a loss of water supplies and what that means to folks. I don't mean to downgrade that. But the fact of the matter is that the water was useable for certain purposes. Hydration, lawn watering, bathing, things like that.

THE COURT: Well with respect to bathing, I mean, people have reported, I mean, in the record that they had skin irritations, loss of hair and so on. So I think you are going in the direction that I don't -- I think I've heard enough on that particular subject, that the water was valuable because it continued to flow. So let's not -- let's not do -- go in that direction.

So but thank you, Mr. Wittie. I think there are other issues that I appreciate that you elaborated on.

Now there's time for rebuttal but what I think would

be most helpful to me -- unless Mr. Morrissey or Ms. Peaslee there's something you want to say.

MR. MORRISSEY: There were a couple of points, if I can cover into, Your Honor.

THE COURT: Okay.

MR. MORRISSEY: First I think Mr. Bishop's argument elided over the Court's ruling on the Daubert motion with respect to Mr. Russell, Dr. Russell. And the fact that we have evidence class wide of everyone receiving uniformly corrosive water and impacting at least the faucets in every home in the city.

THE COURT: Yeah. But I think Mr. Bishop is saying you do have that evidence. But that by the time it reached individual homes, they each -- they were different from the main line to their home and inside their home were different utilities, different types of pipes in everyone's homes, different types of solder. And so on.

And so what I understood him to be saying is we don't gain any efficiencies from certifying a class where we still would causation with respect to individual homes and also businesses would be so individualized. Even though you know big picture Russell and others are saying everyone was harmed by this, we still have a big leap to go to how each one was harmed.

MR. MORRISSEY: To be fair, Your Honor, and

incredibly straightforwardly, each and every home has faucets cost. They cost a few hundred bucks to replace. Mr. Gamble has calculated how much that is. They all received highly corrosive water and their life span was shortened as a result of their --

THE COURT: But we're not talking about their life span. You told me that. We're talking about the damage to their property, not to them.

MR. MORRISSEY: No. The life span of the faucets.

THE COURT: Oh, okay.

MR. MORRISSEY: As a result of their exposure to this corrosive water, they need to be replaced to prevent future leaking of lead into the homes. That's Dr. Russell's opinion. That's what the damage models calculated based on -- it's a class-wide methodology based on proof of injury to each and every class member which distinguishes it from the two cases that counsel highlighted.

Gates, which involved air modeling over 34 years and differences as to whether people were even exposed to this air pollution. Behr, which involves vapors emanating from a lagoon and whether there was a dispute as to whether people had been exposed to those vapors.

And American Medical, which I heard at least twice during the argument, was the case involving penile implants and differences as to whether how each and every surgeon

implanted that highly individualized device.

THE COURT: Okay.

MR. MORRISSEY: That's not this case. This is a case with uniform exposure to highly corrosive water and a method for calculating damages both by Professor Keiser, who finds that each and every home had diminished property values and Dr. Russell combined with Gamble and Pogorilich who find that each and every home need their pipes and fixtures replaced.

THE COURT: Okay. This is very helpful. That's why we're having oral argument.

So why don't we move on now to the issue of our (c)(4) issues class certification.

MS. PEASLEE: Your Honor, may I just add one -- I will be very brief.

THE COURT: Sure.

MS. PEASLEE: With respect to specifically the business loss report, Mr. Bishop referenced that Mr. Simons simply assumes all losses suffered by any business in Flint are attributable to the water crisis. You have our report and our briefings, so I won't belabor this. But that's not the case.

He has compared them to other cities in Michigan as well as to the greater Genesee County and applied a significance factor test to that. The other point that I wanted to address was with respect to this idea that aggregate

damages are not permissible. Mr. Wittie is completing aggregate damages and fluid recovery.

McLaughlin dealt with fluid recover. In that model, any funds that were left over from specific claims would be distributed on a cy-pres basis. That's not what we're proposing here.

THE COURT: Right.

MS. PEASLEE: In re Scrap Metal makes very clear that sort of fluid recover is not permissible. Aggregate damages absolutely are a permissible calculation in class actions.

THE COURT: Okay. Yeah. I've seen that. Yeah. Okay. Thank you.

MS. PEASLEE: Thank you, Your Honor.

THE COURT: All right. So going to the issue of a (c)(4) issues class, let me -- who's arguing this for plaintiffs?

MS. LEVENS: I can address those questions, Your Honor.

THE COURT: Okay. Thank you, Ms. Levens.

First of all, are the six issues that you've identified in your briefing the issues that you think should be certified?

MS. LEVENS: Are you referring to the briefing in our reply brief?

THE COURT: Yes.

MS. LEVENS: Yes, Your Honor.

THE COURT: Okay. And so here I understand you to be saying that the evidence with respect to the first one, which is what was the role of LAN, the role of Veolia in creating the contamination of Flint's water supply, including their involvement to switch to the Flint River as a water source, refrain from using corrosion control, and then conceal information, that with respect to that it would materially advance the litigation.

It is common evidence that would be used for each and every plaintiff in the case. And that the same for your other -- the next one is the standard of care, the scope of the duty that's owed in a professional negligence case, the duty of whether there was breach is number 3. Number 4 is whether the defendants' conduct caused the corrosive water, and the extent to which other actors, what was their contribution with respect to the corrosive water contributions.

Okay. Let's look at number a 5. Did the corrosive water conditions caused by LAN and/or Veolia cause harm to Flint residents properties and businesses?

So I'm sure we might have to rephrase that, you know, if you find that there were corrosive water conditions caused by LAN and Veolia. But why isn't this -- let's assume right now that I don't find a damages -- we're not going to have a minor's class. I can be pretty sure of that. I'm going to

look carefully at the property and commercial loss subclasses for damages. But let's just assume for this argument that we don't have that.

How does this not go directly into individual causation?

MS. LEVENS: I think that it leaves the door open for individual causation to be addressed in subsequent hearings. The purpose of including that is that, first of all, we do believe we have classified common evidence of it. And from our perspective, the more issues that can be resolved on a class-wide basis the better because it will --

THE COURT: I know we have to avoid Seventh Amendment reexamination issues. And how doesn't that -- how does this just not lead us right into a Seventh Amendment trap?

MS. LEVENS: Plaintiffs would argue that whether or not it could -- it caused harm to businesses, property, and residents is distinct from whether the water caused harm to any one specific business resident and property and that those are distinct claims that could be tried separately. But your point is well taken, Your Honor.

MR. MORRISSEY: Your Honor, if I may, since this overlaps with the property issue.

THE COURT: Sure.

MR. MORRISSEY: I think if we cut down the brass tacks of what the evidence would look like, Dr. Russell would

testify that water is highly corrosive. It was distributed throughout the city. Each and every home that has a brass fixture was impacted. That would take place as an issue. I don't think that --

THE COURT: But that's --

MR. MORRISSEY: I don't think defendants' experts even contest those aspects of Dr. Russell's opinions, that the fact that corrosive water damages fixtures is not really disputed by Mr. Duquette. There's some dispute as to whether the fixtures in particular homes were damaged.

Dr. Russell comes back and says that evidence actually confirms what I said in the first place. That's a battle of experts that would take place on a class-wide basis. There can then be individual damage issues of, you know, I have a three-bedroom house or a four-bedroom house, I have six faucets or two. Those could be done in some subsequent proceeding. But there's a class-wide impact issue that would be responsive to that question.

THE COURT: Okay. But I -- and how does that not lend itself to a Seventh Amendment reexamination problem if what we still will need to do, no matter what, is have a trial that will look at individual causation? Why wouldn't you be retrying issue number 5?

And I'm 100 percent with you that simply using similar evidence in an issues class in a later damages trial,

that's not a Seventh Amendment problem. But retrying the exact question would be a Seventh Amendment problem. And when you write this issue number 5 as cause harm to Flint residents' property and businesses, that surely seems like what you would prove in your damages trial.

MR. MORRISSEY: In the subsequent damages trial you would not need to reprove. Assuming we got through trial. We established liability. We established the water is corrosive. We established that it impacts plumbing in any home that has it, those issues would not be reexamined by a jury in a subsequent trial assuming those individuals choose to have a jury trial.

The question at that trial would be --

THE COURT: But you've got question 6 --

MR. MORRISSEY: -- do I have a brass fixture --

THE COURT: Just a minute. You've got question 6, whether the engineering defendant's professional negligence directly and proximately caused the Flint water system to be contaminated with corrosive water and thereby result in property damage to members of the classes.

MR. MORRISSEY: That issue would be established on a class-wide basis and wouldn't be reexamined at the individual damages phase. There's no need --

THE COURT: Why do you need number 5 if you've got number 6? Why don't -- number 5 seems to me it just runs the

risk of causing a Seventh Amendment problem.

And do you have to use the terminology "caused harm" as opposed to establishing that it's corrosive, that it impacts brass pipes, or whatever you want in there, and then the individuals will come in with their evidence of whether they had brass fixtures and so on?

MR. MORRISSEY: It gets you a class-wide finding of fact of injury, which I think is helpful and advances the litigation. There could be offsets that would proven up on an individualized basis. There could be circumstances in a particular home. If someone, you know, remodeled their home on their own, they might have an offset.

So there could be conceivably in that individual phase some defense that would be put forward. I'm speculating because we haven't seen or heard of any of those that might apply.

THE COURT: Okay.

MR. MORRISSEY: But having that fact of injury to anyone who has lead soldered pipes and lead containing brass fixtures which is, according to our experts, all or nearly everyone in Flint established on a class-wide basis would certainly streamline that subsequent phase and would not need to be reexamined at any subsequent phase.

THE COURT: Okay. Anything else you want to say about the -- it seems like we may want to hear from LAN and

VNA and then I can give you time to respond more broadly on the issue class if you want.

MS. LEVENS: That would be fine, Your Honor.

THE COURT: Okay. All right. So Mr. Bishop.

MR. BISHOP: Yes, Your Honor. I'd like to spend some time on the issue classes. The problem in what we've heard, it really goes back to the (b)(3) argument. The problem with what we've heard is it assumes that the expert evidence, the plaintiffs have put in is correct and noncontestable and establishes lots of different elements of cause.

That's not what a trial looks like. What a trial looks like is us contesting that using not only expert evidence, which our experts say that Dr. Russell's theory is incorrect. And they say that based on individual investigation of pipes in homes.

There is just -- it's fantasy to think that fact of injury as to either of these subclasses is a common issue. It's a highly individualized issue for the reasons that we've discussed with (b)(3). So from our perspective --

THE COURT: Let me stop there. I think that's an important question and I don't want to lose sight of it.

So Ms. Levens, can you point me to a case similar to ours, a mass contamination case in which a court has held that fact of injury can be determined on a class-wide basis?

MS. LEVENS: I think most opinions don't use that

language. But Olden would be an example. They certified an entire liability class under (b)(3) and then reserved only damages for subsequent proceedings.

That said, beyond the idea that the corrosive water conditions would be harmful generally to homes, businesses, and people, I do not think that any of the issues portend to decide fact of injury especially as to personal injuries.

THE COURT: Okay. So you're saying none of these questions try to establish that? None of your six questions try to establish personal injury or property damage?

MS. LEVENS: Not for these. They establish foundational elements upon which those could be proven in subsequent hearings. And we believe that for the subclasses, it could also be done. But these proposed issue classes are focused on duty, breach. Causation adds to the contamination event. Foreseeability of harm. Issues like that that really do not vary at all among class members.

THE COURT: Okay. Okay. Mr. Bishop, back to you. Thank you.

MR. BISHOP: Your Honor, the only causation, the causation issue that you began by talking about, which is the question as I understand it, of whether VNA's conduct resulted in corrosive water remaining in the distribution system longer than it would have otherwise, see, that is very different from the questions of common but for causation and proximate

causation that are in this list that plaintiffs have provided.

But even that and the issues of duty and breach, and because I assume this Court is going to decide the question of duty as a matter of law in summary judgment, put that aside and for practical purposes settle in all these other. For breach and that narrow causation that you talked about previously, even for those, issue class certification is not a superior or efficient way to proceed here.

THE COURT: But why not? I mean, how is -- how can you distinguish this case from Behr v Martin?

MR. BISHOP: I think cases have to be -- class cases have to be looked at on their own set of facts. And when you look at the facts, the broad set of facts -- obviously they are disputed. But the broad set of facts here. I think there are four reasons why issue certification is not superior. And they all should be looked at in the context of the fact that there's already a robust bellwether process in place.

And you know the first of these is that issue certification is not going to make a material dent in resolving any claim for any class member. Highly individualized, highly contested issues of causation, fact of injury, damages and allocation of fault are going to remain to be resolved and they make up the bulk of the litigation issue. And no party --

THE COURT: I mean, I don't know of any cases that

say if there are common issues with common evidence and the resolution of which would materially advance the class or the litigation, that it has to solve the whole case. I don't know of any cases that say that. And instead, you're looking at one person who has all of these cases right now in addition to Judge Farah.

And the idea that each individual would come forward and prove the duty and breach and causation of the crisis and then causation of their individual damages seems magnificently inefficient. And that if we can pluck off some of the duty and breach issues and not go potentially based on the law to causation of individual damages, it sure seems like that's a material advancement for all of us.

MR. BISHOP: Well I don't think so, Your Honor. And I think the differences in the cases that you're talking about, that you don't have this robust alternative, that you already have a set of cases that will proceed. They'll go to summary judgment.

If they get past summary judgment, there will be trials initially of minors and then of adults that will resolve all of these issues. Not just the few issues that we're talking about on issue certification. They will resolve all of the issues. And that is what will drive these cases to resolution.

No party is going to change its view on how to

resolve any of this litigation based on a class-wide resolution of a few issues that do not determine liability, let alone damages. As a practical matter, what will drive a resolution is the bellwether process that this Court is overseeing.

Now I do want to address the Seventh Amendment issue that you talked about, because that's an important one and it does go as well to superiority. Now we acknowledge that Martin says you don't have to solve all of the Seventh Amendment issues with a specific plan at this point. But the fact that there will be Seventh Amendment issues in risk of jury confusion is something that should be taken into account when you're considering the sufficiency and superiority of issue classes.

Here there's clearly enough overlap in the facts relevant to breach of duty and proximate cause. Foreseeability, for one. That if a jury -- a second jury is instructed to assume breach based on a first jury's issue determination, it could mistake its obligations when considering causation.

And while there were judicial tools that can be used to address the overlap, the fact that they have to be used and the fact that they're complex and result in complex instructions and verdict forms, that needs to be taken into account.

THE COURT: I would certainly take that into consideration. And what I found kind of interesting reading those cases is that in every criminal trial, in every at least slightly complicated criminal trial, there are confrontation clause problems. There are confession Brutant problems we call it where a portion of a confession in a multi-defendant case is admissible against one defendant and not against others.

And we instruct juries all the time. All that evidence that you just heard, that defendant number 1 did it and confessed to it and is now challenging it, just don't hold that against his co-defendants even though he said he was with them.

So you know, we ask juries to do very complicated things all the time. And we write jury instructions. And the Courts of Appeals have told us we have to trust that jurors can actually get the job done.

And it doesn't matter if N equals 1, which is me. But I have found that jurors ask very detailed questions if they have the slightest question about an instruction. They'll send a note and say what do you mean we can't look at evidence because it was already decided by another jury? Or something like that.

So you've got to convince me that it couldn't be managed.

MR. BISHOP: No, I'm not saying it couldn't be managed. There's always room for error when you have that sort of complex management and, you know, a wasted trial as a result. But the real problem here is that it has to be done at all when the alternative is bellwether trials in which that serious Seventh Amendment issue will arise.

What we're talking about is superiority. We're not talking here about a question of issue trials on the one hand or bellwethers. There will be bellwethers. They're going to start soon. And they will resolve all liability and damages issues, assuming that they get past summary judgment, which we don't think they should, of course.

But they will resolve these cases in a way that meaningfully provides information to the parties about how to move forward. There is an issue resolution will not do that. And so the superiority question including the Seventh Amendment issue, including the fact that we don't think that resolving these issues will materially alter the litigation burden on the part of the parties because this evidence is going to have to be repeated. All of that suggests that it's not superior.

Let me talk a little bit about that point. I mean, the issue certification and litigation here would not change the burden in the trials going forward. I mean, they create their own burdens because, you know, the limited effect of

issue certification here is something that would have to be explained very clearly in the notice to class members so that they can weigh up what they would get from issue certification as opposed to alternatives, like individually proceeding.

So you know, after doubts, a whole additional set of merits discovery, experts, Daubert motions, that would all be necessary to try the certified issues. And then the certified issues are not going to make much of a dent and all that evidence will have to be repeated.

So a determination of breach, for example, is not meaningfully going to shorten followup individual trials on causation injury damages or allocation of fault. The evidence presented in an issues class trial would need to be repeated in individual proceedings.

So example, in individual trials, the jury would need to consider evidence of what VNA did, when it did it, and the context of those actions relative to those the city, the state, the other parties, the nonparties, to determine whether VNA caused any class member any actual harm. If so, to what extent? And to determine comparative fault.

So all of those facts about what VNA did, when it did it, and the context in which it did it are facts that will be presented in an issue class on breach.

THE COURT: An issue class on breach. But then it won't need to be repeated in a damages class because either

the Court or the lawyers through stipulation would inform the jurors of what has already been determined in terms of if a liability finding comes back from an issues class trial, the subsequent jurors in damages, individual damages cases would be informed of that.

MR. BISHOP: That's not how it would work, Your Honor.

THE COURT: No?

MR. BISHOP: We're not talking about damages. We're talking about fact of injury, proximate causation, damages, and allocation of fault.

And in order to make that determination, the fact that a first jury has determined that there has been a breach of the contract, which it will have determined by looking at what we did, when we did it, and the context of those actions in relation to the other actors here, that doesn't go.

That determination did not go to resolving fact of injury causation or damages. That evidence will have to be repeated for the second jury.

There will be -- we don't think there will be any reduction in the quantity of evidence that will have to be placed before the second jury on these issues. And so there will be no efficiency saving in those second trials.

At the same time, the fact that that evidence needs to be presented in the individual cases anyway is not going to

deter anyone from proceeding individually. It's not going to complicate those trials. Because the relevant evidence has been pulled already. It's been mentioned. All the documents have been produced. So we don't think that anyone is going to decide not to proceed individually and bring an individual action because they've got all that evidence available to them.

So really an issues trial is redundant. It's not going to achieve a resolution of any issue that is going to move this litigation forward towards a final conclusion. It is not going to resolve all of the issues of the bellwethers will soon resolve that really will move things along.

It's going to create Seventh Amendment issues that have to be dealt with and raise risks. And it's not going to materially alter the litigation burden on this Court or the parties. And that's true to breach and it's due to the -- and it's true of the limited causation issue that you have mentioned.

And the causation issue really exacerbates the Seventh Amendment problems. I mean, causation is tightly tied to particularized injury claims, right? And determining whether VNA caused the harm will turn on facts about a person, a property, a business that varied from claimant to claimant.

So dividing up issues of causation into the question of whether conduct by VNA resulted in corrosive water

remaining in the system from other causation issues that relate to individual injury is going to result in a lot of complications in what the jury considers during the two proceedings.

THE COURT: Okay. Thank you, Mr. Bishop. Mr. Wittie, are you responding?

MR. WITTIE: Thank you, your Honor. And I promise you I will be brief and I hope very pointed.

I would like to drill into this causation question from a slightly different angle, even from the Seventh Circuit -- Seventh Amendment issue, although I think that's a very important question, and that is the very real possibility that upon hearing the evidence, the jury may come to the conclusion that some members of the class were harmed by corrosive Flint water in some way. Property damage, you know, some health effect, whatever. But that others were not. That there are people on both sides of the fence potentially.

That would not be a very surprising conclusion for the jury to draw.

Now what are we going to ask them? Are we going to ask them did every member of the class sustain this type of injury? If they say no because there are some uninjured members of the class, what has that told us? Almost nothing. Only that not everybody is entitled to recover. It would not be conclusive as to the claim of any particular plaintiff. I

suppose --

THE COURT: Under which issue are we going -- look at the six issues. And none of them have injury in fact or -- well, we're not talking about personal injury damages. We're talking about property and class right now only. But under which one of these six issues does that become a problem?

MR. WITTIE: Well, I think the fifth or sixth issue. Because if you get a no answer to is everybody affected, then you achieve nothing. If you get a -- and that's a possible. A distinct possibility.

THE COURT: Yeah. I don't think we get -- I think issue number 5 is a problem myself. So let's take 5 out for a minute. Now tell me the answer to that question.

MR. WITTIE: Well, the problem is you either have a determination that just they're not class-wide damages which doesn't preclude any particular individual from establishing their damages. They would be -- they would be a factfinding that would not either affirm or deny any particularized damages claim.

So at the end of the day in order to get to a money damages judgment for any particular member of the class, you're going to have to establish causation in a class -- in an individual proceeding anyway. There's no dodging the issue of individualized causation through any of the proposed causation findings here.

And if instead of doing any of the causation on a class-wide basis, if you shunt it, all of it over to the individual side and make everybody prove causation individually, then it's very difficult to see how even a trial on duty and breach is going to move the case forward at all.

Our contention that even a causation determination, you still have so much differential results with regard to injury and fact and of course quantum of loss that you, again, haven't advanced the ball very far in any case.

But and if you're -- the Seventh Circuit emphasized that to avoid these kind of reexamination clause problems you have to carve at the joint, in their colorful phrase. If you begin to pick apart causation, you know, into various sub causation issues, then the more you do that, the greater risk you run of running into a reexamination problem.

And I think that that's what the proposal here is really running a very serious risk of doing. And so they're really on the horns of a dilemma. You can either shunt all of causation into the individual side in which case clearly there's no superiority. Or you can begin to carve up causation into little bitty sub issues and you run into a reexamination issue, which in itself defeats superiority. But either way you don't have a viable way of proceeding.

THE COURT: Okay. Thank you. I have a question, Ms. Levens, about -- in your briefing in your initial motion

you talk about a question, an issue, that reads as follows. "Whether the engineering defendants breached their duty or duties owed to class plaintiffs and whether any such breach was malicious, willful, and wanton as to disregard class plaintiffs' rights."

Where does the malicious, willful, and wanton come from in a professional negligence cause of action?

MS. LEVENS: I don't think that a jury would need to find that. And I think that's why while it's an example of an issue that could be certified on a class-wide basis, it's not included in the list that's in our reply brief.

Did Your Honor have other questions or would you like me to address the matters raised?

THE COURT: No. Go ahead and address the matters raised.

MS. LEVENS: No, it's fine.

Several points, Your Honor. I think as a threshold starting point, the idea that a binding liability determination on duty and breach does not advance this litigation is absurd. And the Court need not take my word for it. All it needs to do is open up the summary judgment motions that Veolia and LAN have filed in the bellwether cases. And they extensively litigate these issues.

I also think, second of all, as to causation, the Sixth Circuit recognized in Sterling that causation can be

separated into general and specific.

Here the causation elements that the Court would ask the jury to decide turn on whether or not Veolia and LAN's conduct served in part to cause the contamination. It would also address the extent to which any other defendants or third parties serve to cause the water contamination specifically.

In a subsequent proceeding, there would be individual. The Court could ask whether or not the contamination itself harmed specific plaintiffs.

Now to decide whether or not this presents the Seventh Circuit Amendment, the easiest way to think about this is to start to think about what the witness lists would look like for both proceedings.

Now for a class-wide liability trial that addressed general causation, witnesses would include LAN employees, Veolia employees, experts regarding breach. It would also include all of the witnesses that Veolia and LAN have listed as other causes of this particular harm.

That jury would be asked to decide if LAN and Veolia contributed to the harm. And if so, what amount should be attributed to them.

In the second individual proceeding, there would be no need to call any of those witnesses to play that deposition testimony, to hear from those experts. You would only need to talk to a very different variety of experts who would talk

about whether the contamination itself harmed that particular plaintiff.

That is also when defendants would have an opportunity to say this contamination was not the cause of these particular injuries. It was something else. It was lead paint. It was their house wasn't repaired correctly. But none of the witnesses or exhibits that would be used to establish those defenses would turn on the -- would overlap with the evidence or witnesses called at the trial as to general causation.

Deciding all of these issues now, their arguments just now and in the briefing, Veolia and LAN really emphasize how complicated these subsequent damages proceedings would be, how time consuming. All that means is that we all benefit if we can limit those proceedings to just those matters that must be decided on an individual basis.

With regard to the bellwether trials, I think one problem here is the wrong assumption that it is one or the other. Bellwether trials can be useful in providing information regarding the valuation of particular claims. But the preclusive effect of those holdings is far, far from certain.

In diversity cases federal courts apply the preclusion rules of the state court. And to date Michigan does not recognize non mutual estoppel which means it would be

very uncertain if any aspect of those trials would be binding on future courts. And even if the Court believed that that issue may be sort of tended towards they could be binding, the supreme court in Phillips Petroleum made clear that it is not up to the court in the initial decision to decide the future preclusive effect of that decision.

Mr. Bishop and in Veolia's briefing suggests that bellwether trials could lead to a resolution of this entire matter. And if that happens, that is wonderful. But nothing about certifying issue classes right now precludes that eventuality. However, denying certification of an issue class now could very well deny tens of thousands of people an opportunity to bring their claim.

I think -- and I think Your Honor might have questions, so I'll pause after this.

THE COURT: No, no, no.

MS. LEVENS: I think it's useful to take a pause here and look at the numbers. Oftentimes in these arguments you hear plaintiffs talking about how much these unnamed people want to litigate this case and defendants saying it's not necessary. A handful of people can try the case. And it's hard to know which is correct.

But in this case we don't need to just imagine it. We have actual numbers. And if you look at the special master's most recent census from April of 2020, you'll see

that 19,000 individuals have been retained but only 5,000 of those plaintiffs have filed suit. Less their be a concern that only those who have retained counsel are interested in proceeding.

From the most recent registration report as to the settlement, more than 20,000 individuals registered for the settlement showing at least some interest in proceeding here but not controlling that litigation on their own.

THE COURT: Yeah. I don't know how valuable those numbers are. I hear what you're saying. I would say that if I were sitting where you're sitting. But we also know there was a statute of limitations problem with filing before this decision was made.

We know that there are reasons that that -- those numbers have played out the way that they have. But I certainly hear you.

MS. LEVENS: I think that is where though not just the census report but looking at the information from the settlement, as to how many of tens of thousands of people indicated an interest in proceeding but they had not retained their own counsel. There is interest out there.

Nothing about certifying this liability class precludes any individual from having their day in court if that is what they want. But as defense counsel acknowledged, these first bellwethers are only for minors. It could be a

few more years before we have bellwethers for property cases. There are adults, there are businesses.

The extent to which the Court can use issue certification as one of several tools at its disposal to streamline this clearly shows this is a superior way of proceeding.

THE COURT: Okay. Thank you. Okay.

I think we're -- we've covered a lot of territory. There's certainly other issues embedded in the briefs. And please know that I've read your briefs and I will return to them before issuing a decision.

One question I have, Ms. Levens, is whether -- at the beginning of the hearing we looked at the class definitions and identified some problems with them.

Do plaintiffs want an opportunity to fashion a different definition or do you think if I proceed towards certification of some type of class, I should be the one to do it?

MS. LEVENS: Reading between these lines, Your Honor, I think it might be useful to the Court if we were to submit a revised definition now rather than waiting for an opinion. And if that's so, we are more than happy to do so and request that here.

THE COURT: And then the issue becomes that, of course, Mr. Bishop and with Mr. Wittie and their colleagues

would want to respond to that.

MR. BISHOP: We would, Your Honor.

THE COURT: Yeah. Okay. Let me give it some thought and I'll issue an order if I decide to go in that direction and I would absolutely provide an opportunity to respond to the definition.

MR. LEOPOLD: Your Honor, if you intend to issue an order, give us the timeframe when you would like for us to provide it to the Court, we'll do it certainly on or before that day. And if there's any other issues that come up and the Court wants to inquire as to additional questions, of course we're fully ready to respond to anything you may have.

THE COURT: Okay. Thank you. Okay.

So let's go back to two other things. One is that depending on how the decision goes, I would deny without prejudice or as moot at this time the 12 remaining Daubert motions. Then there are concurrences and separate briefing from LAN and Veolia. All of that would be addressed.

I do intend to address a little bit further the Dr. Russell and Dr. Gardoni issues that have been decided. But I may include a little bit of information on that as well just to provide a little more material.

And then I wanted to know -- Mr. Stern and Mr. Walker and Mr. Shkolnik had filed a brief -- are there any brief remarks that you want to make on behalf of your clients?

But I just note that your brief was remarkably comprehensive and I learned a lot and I appreciated it a great deal. But I am cognizant of something that plaintiffs said in their reply brief, which is that your clients are in individual cases and you don't have class clients or potential class clients I guess. So I don't know that you necessarily have standing, so to speak, to argue.

But if you want to say something, feel free to say something relatively brief.

MR. STERN: Your Honor, I believe Mr. Walker is going to make a few brief comments. And I would just note that based on the master definition of the class, all of our clients would fall into the class.

THE COURT: Oh, okay. Right. I hear you. Okay. So Mr. Walker.

MR. WALKER: Yes, Your Honor. I think just to the extent that, you know, whether it's having standing or not.

THE COURT: That's okay.

MR. WALKER: It would probably be helpful to the Court, of course, just to make a few points about -- I think the most salient point is, you know, on the issues class. That, you know, there's still predominance and superiority inquiry that applies to an issues class. And so, you know, I think the bellwether trials, you know, sort of were discussed by the other parties.

I think one important point is that a bellwether trial, at least as it pertains to, of course, the minors, is that it's a full result as opposed to a partial result. You know, the inquiry, you know, that sort of follows in Martin v Behr is does the, you know, issues class materially advance the litigation.

And just to be clearly, frankly, the co-liaison counsels' clients and I think the most recent census report, the high confidence number for clients represented by Levy and Napoli is about 16,000 plaintiffs. We are going to opt out of the class. And there is well established precedent from the Tenth and Seventh Circuits. For example, Premier Mechanical in the Seventh Circuit.

There's no, you know, the class isn't going to be bound by any bellwether trial. There's no res judicata there. But there's also no res judicata the other way. And so the superior way to resolve these cases is to give the parties, VNA and LAN and the plaintiffs, a complete result from which they can base their settlement negotiations going forward.

You know, something that, I mean, at one point I think that class counsel intimated that there's not a lot of serious dispute about things like duty and breach. And I think reading the I think it's 110 pages or something like that motion for summary judgment from VNA, I think there is. But I think the more important point is that something that

results in thousands of individualized hearings following an issues class trial does not materially advance the litigation to a reasonable termination.

And you know the more than the Court tries to pack into an issues class to make that a reasonable vehicle for materially advancing the litigation, the closer and closer the Court comes to potential Seventh Amendment issues.

At the risk of taking more of the Court's time, I will cede my time and thank the Court for the opportunity.

THE COURT: Sure. Thank you.

MS. LEVENS: Your Honor, if I'm extremely brief, may I add two very short items?

THE COURT: Sure.

MS. LEVENS: We're not going to talk about standing. Who cares?

First of all, there is an opt out right. But to the extent it makes things more streamlined, just like with the proposed settlement class, people who have retained counsel or filed suit could easily be excluded from the class.

Two, Mr. Walker and Mr. Stern, Napoli, they are clearly zealous advocates for their clients. I have had the privilege of working with them through discover and with the settlement for years now and I don't think anybody would dispute that.

But I also think it's clear that they are looking out

for their clients as they should. I think here what we're saying is there should be a vehicle for the tens of thousands of other people who have not retained counsel to find recovery. And we think that there is a class solution for that.

So it's been a long day. Thank you for your time. I appreciate it.

THE COURT: Thank you. Thank you, all.

Just the briefing was very helpful. And this argument has been as well. So I appreciate it a great deal.

So what I'll do is take the motion under advisement and issue a written decision as soon as I can sort through all of this. And if I determine that it would be helpful to hear from the plaintiffs about the class definition, if you believe there are modifications needed, what those would be, along with the response from defendants, I'll set forth a briefing schedule for that.

So thank you, all, very much. And I think we have time set aside -- I shouldn't even say when. On the 23rd of June for discovery conference, if needed. There are other time slots. But I won't try to say them now because I might mess them up.

Judge Farah, anything you'd like to add to this? Thank you for your enormous patience with us.

HONORABLE JUDGE FARAH: Thank you, Judge Levy. Fine

judicial job in handling very, very difficult issues facilitated by extremely capable representation.

THE COURT: Thank you. Thank you. Well, the next big deal thing we have going on is we do have the motion for final approval of the partial settlement in the fairness hearing for the class portion of that on July 12th beginning at 10:00 AM.

So there are some status conferences and so on between now and then. Thank you, all. Take care. Stay healthy and vaccinated and I will see you all soon. Bye.

(Proceedings Concluded)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Jeseca C. Eddington, Federal Official Court Reporter, do hereby certify the foregoing 113 pages are a true and correct transcript of the above entitled proceedings.

/s/ JESECA C. EDDINGTON 6/14/2021
Jeseca C. Eddington, RDR, RMR, CRR, FCRR Date